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MONTGOMERY COUNTY

LAW REPORTER

CONTAINING CHIEFLY

REPORTS OF CASES

DECIDED BY

THE COURTS OF MONTGOMERY COUNTY

FOR THE YEAR 1901.

VOL. XVII.

REPORTED BY F. G. HOBSON
OF THE MONTGOMERY COUNTY BAR.

NORRISTOWN, PA.
1901.

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Jan. - Dec. 1901

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Court of Common Pleas of Montgomery County.

IN EQUITY.

ROSANNA KRIDER vs. SAMUEL F. KRIDER.

Where the answer to a bill in equity is responsive to the bill and denying all its material averments, the duty is imposed on the plaintiff of sustaining his bill by the evidence of one witness beside himself, or by circumstances equivalent to a second witness.

No. 6, March T., 1900.

Hillegass & Larzelere, Esqs., for plaintiff.

G. Herbert Jenkins, Esq., for defendant.

Opinion of the court by WEAND, J., November 23, 1900.

HISTORY OF THE CASE.

This case was heard by the court on bill and answer and testimony of witnesses.

Plaintiff alleges that she conveyed certain property to her son in consideration of his maintaining, supporting and caring for her for a term of twenty-five years, or so long as she should live; that after living with her son for a time he compelled her to leave his house, and refused and still refuses to support, maintain and care for her. She asks for a reconveyance of the property and an injunction to prevent encumbrances or alienation of the premises. The answer and testimony deny the fact of dismissal from the home or refusal to support according to the agreement.

FACTS FOUND.

1. By deed dated May 29, 1893, plaintiff conveyed in fee to defendant a messuage and tract of land particularly described in the bill. Said deed is recorded in the Recorder's office at Norristown, in Deed Book No. 384, page 212. The consideration mentioned is seven hundred dollars ($700), subject also to a mortgage of three hundred dollars.

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2. On the same day, and cotemporaneous and as part of the agreement of the parties, an agreement was entered into between the parties stating that "in consideration of the conveyance the said Samuel F. Krider agrees to and with the said Rosanna Krider to keep, maintain, support and care for her the said Rosanna Krider for and during the period of twenty-five years, or so long as the said Rosanna Krider shall live; and further agrees that if he should neglect and refuse to fulfill said covenants, that in that event said conveyance shall be null and void, and a reconveyance of said premises shall be made by him the said Samuel F. Krider. The said Rosanna Krider agrees and covenants to and with the said Samuel F. Krider to live with, and board with, the said Samuel F. Krider so long as she shall live, and not hold him liable for any maintenance, support or care away from his house or home," etc.

3. The defendant is a married man and the son of plaintiff.

4. Plaintiff from May 29, 1893, until December 23, 1899, lived with her son, and then left his home; but was not compelled to do so by defendant.

5. Plaintiff is now and has always been willing to keep, support and maintain plaintiff at his home, in accordance with their agreement.

6. The agreement was not recorded until December 19, 1899.

7. Plaintiff has failed to sustain the averments in her bill necessary to a recovery.

8. Defendant's answer denies all the material averments of the plaintiff's bill.

CONCLUSIONS OF LAW.

That plaintiff's bill be dismissed with costs:

Argument.

The testimony of plaintiff standing alone is denied and contradicted by defendant and his wife. In equity, under such circumstances we could not grant an injunction. Even if we were only in doubt, a reconveyance could not be ordered; but, in addition, we are of opinion that plaintiff is not correct in her contention. We think her age, physical condition and temperament may account for her conduct.

In Campbell's Executrix vs. Patterson, 95 Pa., 447, it was ruled that "where the answer to a bill in equity is responsive to the bill

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and denying all its material averments, the duty is imposed on the plaintiff of sustaining his bill by the evidence of one witness beside himself, or by circumstances equivalent to second witness." Defendant also contends that the bill should be dismissed as an ejectment bill; and that the agreement can not be received in evidence, it not having been recorded as provided by the act of June 8, 1881, P. L. 84.

We prefer to rule the case upon the facts which we hold are not sufficient to sustain the bill.

And now, November 23, 1900, unless exceptions are filed to these findings and conclusions within the time provided by law and the equity rules, the Prothonotary will mark the bill dismissed at costs of plaintiff.

Court of Common Pleas of Philadelphia County, No. 4.

BUCHI, ASSIGNEE, VS. PUND.

Sequestration is a species of execution. Instead of levying upon a life-estate in real property and selling it, as may be done under the act of Assembly, a creditor has a right to a writ of sequestration, by which the rents and profits of the life-estate may be taken and applied to the payment of the judgment until it is satisfied.

A defendant may claim exemption against a sequestration of the profits of a life estate.

Sequestration is not like an assignment for the benefit of creditors. Simple contract creditors take nothing under a sequestration. Each creditor must obtain his own judgment and writ, or be given leave to become a party to an existing sequestration.

EXCEPTIONS to auditor's report on account of sequestrator of rents and profits of life-estate collected by him in the payment of judgment.

E. H. White and *S. Davis Page, Esqs.*, for exceptions.

Joseph W. Hunsicker, Esq., contra.

Opinion of the court by ARNOLD, P. J., July 16, 1900.

Sequestration is a species of execution. Instead of levying on life-estate in real property and selling it, as may be done under the act of Assembly, a creditor has a right to a writ of sequestration, by which the rents and profits of the life-estate may be taken and applied to the payment of the judgment until it is satisfied. Being an

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execution, we see no reason why the defendant should not be entitled to her exemption. If the life estate were levied upon for the purpose of sale, the defendant might have an appraisement and exemption. This was decided in Sener vs. Scherff, 10 Pa. C. C. R., 529. Or if the property is too valuable to be retained by the defendant, she might obtain her exemption out of the proceeds of sale, on giving due notice of her claim. The exemption law of 1849 exempts property to the value of $300 from levy and sale on execution. A sequestration is certainly a levy; and, while it is not a sale in the sense of being an out-and-out transfer of the property forever, it is equivalent in effect to a sale of the property during the time required to pay the judgment on which the writ of sequestration issued. We do not think the defendant in this case has lost her exemption by laches. No injury has been done to the plaintiff. She has not been put to any expense or delay by the failure to claim the exemption at an earlier day. Therefore the exception of the defendant will be sustained, and she will be allowed her exemption.

The claims of Louisa McHenry and Henry Weichman will be postponed to the claim of the plaintiff. The assignment under which these parties claim was not recorded, nor were they parties to the proceedings for the sequestration of the rents and profits of the defendant's life-estate. Sequestration is not like an assignment for the benefit of creditors. It is more like a fi. fa., in which the party who obtains it is entitled to priority of payment according to the time of the levy, saving the rights of prior lien creditors: Act of October 13, 1840, Sec. 7, P. L. (1841) 3. Simple contract creditors take nothing under a sequestration. Each creditor must obtain his own judgment and writ, or perhaps he will be given leave to become a party to an existing sequestration. As the plaintiff has by her action produced the fund which is in court, she is entitled to the payment of her judgment in full, after allowing the defendant's exemption; and the sequestrator will continue to collect the rents and profits as they accrue, for the purpose of paying the plaintiff.

Exceptions of Anna Pund sustained, and exceptions of Louisa McHenry and Henry Weichman dismissed.

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Court of Common Pleas of Montgomery County.

C. A. RUDOLPH vs. SAMUEL STURGIS.

There can be but one final judgment for the same cause of action; and where a judgment has already been obtained in a prior action by the plaintiff against the defendant for the identical demand, contract or obligation, it is merged by the superiority of the record security acquired by the judgment, and the creditor can no longer prosecute suit upon the original demand.

A plaintiff has a right to withdraw or discontinue his suit at any time before judgment, or before the justice pronounces upon it; but after judgment unappealed from, if he discontinues, it is satisfaction of the demand.

PLEA in abatement. No. 96, March T., 1900.

Larzelere, Gibson & Fox, Esqs., for plaintiff.

Evans, Holland & Dettra, Esqs., for defendant.

Opinion of the court by WEAND, J., November 23, 1900.

To this action the defendant has filed a plea in abatement that "about the beginning of December, 1899, a prior action of attachment for the same debt for which the present action is brought, was brought by said plaintiff against deponent (defendant) before Justice of the Peace M. A. Francis, of Lower Merion township, and that the same property was attached thereunder as was attached in the present action; that judgment was given against defendant, and subsequently said cause was discontinued by the said plaintiff."

The plaintiff by his answer admits that judgment was given against said defendant, but that upon advice of counsel the whole proceeding was irregular in that the attachment was issued on the 13th day of December, 1899, and made returnable on the 20th day of December, or beyond the time allowed by the act of Assembly; and that therefore the whole proceeding *ab initio* was irregular and void. Therefore, upon application of the plaintiff, the justice of the peace on the 6th day of January, 1900, made the following order: "Now, January 6, 1900, hearing discontinued on account of irregularity of date of return of summons and attachment, and defendant notified thereof"

The record of the justice, which is made part of the answer, shows that on the return day both parties appeared and were examined. The defendant made no objection to the writ, nor did he dispute the jurisdiction of the justice. Having taken his chances by

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going into the merits of the case, he has waived his right to take advantage of the irregularity and is bound by the judgment unappealed from. See McKinley vs. McDonough, 27 W. N. C., 340; Temple vs. Myers, 16 C. C., 232; Weidenhamer vs. Bertle, 103 Pa., 448; Myers vs. Stauffer, 22 W. N. C., 412. We then have a case where a plaintiff sues and the defendant appears and contests the claim, with a judgment for plaintiff. Conceiving that the irregularity as to time is fatal the plaintiff discontinues his suit after judgment and brings another suit for the same cause of action, to which the former recovery is pleaded in abatement.

That a plaintiff in a suit before a justice may suffer a non-suit before judgment is ruled in Gibson vs. Gibson, 20 Pa., 9; Blair vs. McLean, 25 Pa., 77; but we cnn find no authority allowing him to do so after judgment in his favor. In Blair vs. McLean, *supra*, the court said: "The plaintiff has a right to withdraw or discontinue his suit at any time before the justice pronounces upon it." In Riddle vs. Tidball, 1 Pitts. L. J., 107, the Supreme Court said: "We have decided in another case that a plaintiff may discontinue his action before a justice at any time before judgment." Evidently the court by using the language "before judgment" and "before the justice pronounces upon it" intended to draw a distinction between a discontinuance before and after the magistrate or court had rendered a decision. The reason for the rule we think may be found in the opinion of the court in Baxley vs. Linah, 16 Pa., 241. "The law discourages a multiplicity of unnecessary actions as vexatious to the parties and an abuse of the administration of the laws. It is settled that where a judgment has been already obtained in a prior action by the plaintiff against the defendant for the identical demand, contract or obligation, it is merged by the superiority of the record security acquired by the judgment; *transit in rem judicatum*, and the creditor can no longer prosecute suit upon the original demand, though it were a specialty. If he do so, the defendant may plead, in bar, the judgment recovered against him by the plaintiff for the same cause of action."

It is well settled that where two personal actions are instituted between the same parties for the same cause of action, a recovery of judgment in one extinguishes the right to secover in the other and gives to the plaintiff, in lieu thereof, a security of a higher order: Miller vs. Rohrer, 127 Pa., 384.

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The fact that plaintiff has realized nothing on the judgment has no bearing on the case. If he can discontinue once he may do so again, and thus continually harass the defendant. Having obtained his judgment, and it not appearing that defendant had appealed or was not content, we think plaintiff could not discontinue and bring a new suit for the same cause of action.

And now, November 23, 1900, judgment for defendant on his plea in abatement with costs.

Orphans' Court of Westmoreland County.

Ray's Estate.

A guardian sold real estate of his minor under the Price act. The minor died and the guardian paid the money to minor's administrator, who accounted for it as money. The minor left a surviving husband and child. On distribution the heirs claimed the estate as land. A judgment creditor of decedent claimed that it was personalty. *Held*, that the estate was distributable as personalty.

Auditor's distribution.

Wentling & Miller, Esqs., for accountant.

George W. Flowers, Esq., for judgment creditor.

Opinion of the court by Doty, P. J.

The account of the administrator shows a balance due the state of $839.29. This fund was received from a former guardian of the intestate. The administrator charges himself with the amount received, and after claiming credit for certain expenses reports the above balance for distribution. The auditor finds that on petition of the guardian the Orphans' Court of Allegheny county decreed the sale of certain real estate of the ward. This sale realized the sum of $750, and went into the hands of the guardian. The accrued interest increased the fund from $750 to the amount charged against the administrator of the account.

The auditor distributes the sum of $750, less some expenses, as real estate, and the balance as personalty. The personal estate is insufficient to pay the debts. A creditor, whose claim is evidenced

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by judgment, takes exception to such distribution. The question now is, Is the principal fund in the hands of the guardian and paid to the administrator after the death of the intestate to be treated as real estate or personalty in a contest between the surviving husband and child on the one side and a creditor of the estate on the other side?

The sale was under the act of April 18, 1853, and was made for the benefit of the minor, as the real estate was represented as unproductive. The seventh section of the act expressly provides: "No purchase or sale by authority of this act shall change the course of descent or transmission of any property changed in its nature by virtue thereof, as respects persons who are not of competent ability to dispose of it." The auditor relies on this section and on Holmes's Appeal, 53 Pa., 339, which appears to be the only case on this section of the act of 1853. Holmes's Appeal undoubtedly holds that the proceeds of a minor's real estate sold under thx act of April 18, 1853, possesses land. But we must look to the facts before we hastily conclude that Holmes's Appeal controls the case in hand. In Holmes' Appeal there was a distribution of the fund in the hands of the guardian who had made sale of the real estate, and the contest was between those claiming under the intestate laws. Here we are distributing a fund that has passed from the guardian to the personal representative of the deceased ward, and the contest is between a judgment creditor and those claiming by descent.

The distinction is not unimportant. To begin with, the fund passed to the personal representative as money, and is so charged in the account, without ear-marks to indicate that originally it was the proceeds of real estate. There is nothing to identify the fund. Because the guardian received $750 through the sale of real estate, the auditor sets apart a like amount in the hands of the accountant. If the proceeds are to be treated as land in every respect, the administrator was not entitled to this particular fund. What is said by Mitchell, J., in Wentz's Appeal, 126 Pa., 549, is applicable to this phase of the case, to wit: "If we confine ourselves rigidly to the question raised by the actual records, this case would lie in a very small compass. The account is the account of the administrator; the money was received by him as money due his intestate; was put into his accounts as money, and now must necessarily be distributed as money. And that is the end of the case."

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The real important distinction, however, between this case and the one on which the auditor relies, lies in the fact that this is the second transmission. In point of fact there was a conversion of land into money, and as such it passed to the guardian and then to the administrator. In point of law, it retained its character as land for one purpose only. While Holmes's Appeal, *supra*, is the only case bearing directly on the section under consideration, yet there are many cases under other statutes which direct that a sale for some specific purpose shall work no conversion. A sale of land usually works a conversion, but it is not so in partition and some other cases by virtue of legislation. Thus, under prior legislation, the surplus in a sale for payment of debts was distributable as real estate; yet in Grider vs. McCloy, 11 S. & R., 224, when such surplus was paid to the guardian of a child who died in infancy, it was held that it went to the personal representative and not to the heir. In Pennell's Appeal, 20 Pa., 518, a minor's land was sold for maintenance; the fund went into the hands of the guardian; the minor died unmarried and without issue. It was held that the surplus arising from the sale was to be treated as money. In McCune's Appeal, 65 Pa., 450, after partition, the share of a minor was paid to her guardian; the child died in her minority; the fund went to her administrator as money, and was so distributed. With little variation in the facts, to the same effect are Harris's Estate, 69 Pa., 219, and Wentz's Appeal, 126 Pa., 541. Uuder these authorities, after the second transmission of the fund the balance is to be distributed as money. This is especially so, as the administrator stands charged with so much money without any suspicion on the record that part of it is real estate and part personalty.

As a preferred creditor is claiming a small amount of the balance, there seems to be no occasion to go out of our way to ascertain from what sources the administrator derived the fund with which he is charged.

The report, therefore, is referred back to the auditor to make distribution in accordance with this opinion by awarding to the excepting creditor the full amount of his claim and distributing the balance as personalty among those entitled thereto under the intestate laws.

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Court of Quarter Sessions of Montgomery County.

In re Road in Cheltenham Township.

Road proceedings—Sufficiency of the petition to vacate—Railroad depot as a terminus—Offer of railroad company to build bridge.

A petition to lay out a new road and vacate the part of an old road supplied by the new will be sustained where the new road has but one terminus in the old road and the part to be vacated is specifically designated and the reasons for the vacation are fully set forth.

A supplemental petition may be filed giving the reasons for the vacation. Such additional petition will enable the court to exercise its discretion in determining whether a jury should be appointed.

An offer to build a bridge at the expense of a railroad company will not vitiate the report of the jury. If the offer by the railroad company is conditional, the court may take adequate security for its performance before the report is confirmed absolutely. The report of the jury must be unconditional.

A railroad depot is a public terminus for a highway.

Grade crossings are not favorites before the law, and a proceeding to abolish a dangerous one will be sustained unless attention is called to some well defined legal defect in the proceedings.

EXCEPTIONS to report of viewers.

J. B. Larzelere, Jr., Esq., for the borough of Jenkintown, an exceptant.

N. D. Tyson and *T. R. Elcock, Esqs.*, for Thomas Nicholson, an exceptant.

Evans, Holland & Dettra, Esqs., for petitioners.

Opinion of the court by SWARTZ, P. J., January 7, 1901.

Twenty-three exceptions were filed to the report and proceedings. Some relate to the merits of the application. These we shall not now consider, as a petition for a review is pending.

It is claimed that the petition is defective in that it fails to pray for the change or vacation of part of an existing public road.

The application is for a new road and the vacation of a definite part of an old public road supplied by the proposed new public road. The evident purpose of the new road is to provide a safe passage-way over the tracks of the Philadelphia and Reading Railway Company. The present crossing is at grade, and is necessarily very dangerous because of the many trains that pass over the road. It will be noticed that the application is not to *change* part of an existing road—that is, the route of the old road is not to be changed. Both termini of the new road are not in the old road. The new road ends in the old road but begins at the intersection of two other roads.

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It is, therefore, entirely proper that the petitioners should ask for a new public road.

If the new road supplies a definite part of the old road, we see no reason why a jury may not vacate the useless part, if the petition calls special attention to this feature of the case so that all parties interested may have a hearing. A similar proceeding was upheld in Chanceford Road, 1 Delaware, 432. We do not think that Road in Ross Township, 36 Pa., 87, condems this method of procedure, as intimated in Blakely Road, 8 County Court Rep., 498. What the court condemned was the failure "to set forth in a clear and distinct manner the situation and other circumstances of such road or highway or of the part thereof which the applicants may desire to have vacated." In the application pending before us the part to be vacated is specifically named, and the reasons and circumstances are set forth.

The form of petition here used is no stranger to us, but is found among our records and is approved by one of the standard Form Books.

It is also claimed that the court had no jurisdiction to entertain the petition, because it was defective and not cured by the supplemental petition. The original petition set out that the part to be vacated would be dangerous, inconvenient and burdensome if the new road should be laid out and opened. This was sufficient, according to Road in Manheim, 12 Pa. Super. Ct., 279. The object in setting out the reasons for the vacation is to enable the court to exercise its discretion in determining whether a jury should be appointed, and this information can be conveyed by the supplemental application as fully and clearly as by the original petition. Then, too, we must remember that the main object of the petitioners is to secure a new road; the vacation may or may not follow. If the new road, in the judgment of the jury, is necessary, and yet fails to supply any part of the old road, both should stand.

The objection that Greenwood avenue after the vacation will terminate in a *cul de sac* or blind street is not well taken. The unvacated part of the street ends at Jenkintown station. A railroad station is a public terminus: West Pikeland Road, 63 Pa., 471.

The proceedings clearly show that the whole of the vacated portion of the highway is in Cheltenham township. No part is within the limits of the borough of Jenkintown.

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Road in Cheltenham Township.

The nineteenth exception alleges that "the road as laid out by said viewers is not a road in contemplation of law, but simply a site for a bridge with ground sufficient merely for the necessary abutments and approaches thereto."

No depositions were taken, and an inspection of the draft does not clearly show that the whole road as laid out constitutes a bridge. The road is four hundred and fifty feet long, and it is evident that the bridge necessary to span the railroad tracks will take up the greater portion of the highway. Suppose the approaches to the bridge do extend to the terminus of the road on either side of the bridge, the passage-way is still a public highway. "The approach to a bridge is part of the highway, and so is the bridge itself": Penn Township vs. Perry County, 78 Pa., 457. It does not follow that the structure necessary to cross the railroad tracks will be a county bridge. The whole four hundred and fifty feet may become a township road to be maintained by Cheltenham township, just as its other highways are maintained. Grade crossings are not favorites before the law, and we do not wish to defeat the laudable purpose to abolish this very dangerous one unless our attention is called to some well defined legal obstacle.

Exception is taken to the letter of the Vice President of the Philadelphia and Reading Railway Company, on the ground that the viewers were improperly influenced by it. The letter contains an offer to build a bridge exclusive of the approaches, at the expense of the company, at the point where the new road crosses the railroad tracks.

This offer is not surprising when we consider the interest of the company in the abolition of the grade crossing. It is proper that it should contribute toward the improvement. The offer to do what in common fairness it ought to do, can not be treated as improper testimony. That a railroad company may assist in an improvement of this character by an offer to build a bridge without vitiating the proceedings for a new road, is fully recognized in Derry Township Road, 11 Pa. Super. Ct., 232.

It is said the offer is not binding on the company, because made by the Vice President. But he pretends to speak not for himself but for the company, and it may well be that the company itself duly authorized him to make the offer. The report of the jury, however,

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is unconditional, and is not made dependent upon the bridge being built by the railroad company.

If the offer to build is to be treated as a material factor in the case, the court will see that its performance is adequately secured before the report of the jury is absolutely confirmed, as suggested in Derry Township Road, *supra*.

The sixth exception sets out that part of the old road within the limits of the bed or right of way of the railway company is not vacated.

This small triangular tract within the road-bed or right of way is too insignificant to disturb the proceedings. It is wedge shaped and but eight feet wide at the north side of the highway, and runs to a point in about twelve feet measuring toward the centre of the highway. Apparently it is part of the passage-way to the platform of the depot, and even if vacated the railroad company would not close it to the public. It is no part of the right of way used by the rails and cars of the company.

The petition fixes the ending at the bridge over Tacony creek on Greenwood avenue, and the report of the jury ends the new road at the same point and by precisely the same language. Without depositions to disprove the correctness of the report, it must stand. The draft does not support the exception. If the ending is at the approach to the bridge, it is still an ending at the bridge.

And now, January 7, 1901, the exceptions are dismissed, and a jury of review will be appointed as prayed for.

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Court of Common Pleas of Montgomery County.

HARRIET BARRETT VS. HARRY SMITH.

A claim for the benefit of the exemption out of real estate levied upon by the sheriff is not too late when made after advertisement where there is a waiver of inquisition in the warrant of attorney confessing judgment and the sale is advertised on the same day the levy is made.

Where the debtor had no notice of the levy or sale before the 29th of November, and employed counsel on the 1st of December, and the appraisement was made on the day before the sale was to take place, no costs were incurred which by reasonable diligence could have been avoided. All the costs were incurred prior to the 24th of November. The sheriff should advertise, if possible, in at least one newspaper that circulates in the neighborhood where the property is located, and where prospective buyers and interested parties are usually found.

EXCEPTIONS to the appraisement of the debtor's exemption. No. 36, December T., 1900.

Wm. F. Dannehower, Esq., for exceptant.

Hillegass & Larzelere, Esqs., contra.

Opinion of the court by SWARTZ, P. J., January 9, 1901.

The plaintiff issued her execution on November 8, 1900. The writ was made returnable December 3d. The judgment was entered on a note with warrant of attorney confessing judgment. The debtor waived inquisition and condemation of real estate.

The deputy sheriff levied on three tracts of land on the 13th or 14th of November. At the same time he took a description of the premises and made certain measurements at the barn. This building was the only improvement remaining on the land. The defendant lived at Pennsburg, four miles distant from the premises. The tracts were not occupied by any one, except that one Jonathan Binder had the use of the barn.

The sheriff advertised the sale on the said 14th of November in two Norristown newspapers. These papers have no circulation in Pennsburg or in that vicinity. Three weekly papers are published at Pennsburg which do circulate in that community. Other newspapers published at East Greenville, Schwenksville and Harleysville find their way into this neighborhood. Norristown is thirty miles distant from Pennsburg.

The sheriff's hand-bills were put up on the 23d of November, and one was posted on the barn. The sale was advertised for the

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5th day of December. Mr. Binder, who had the use of the barn, was present when the deputy sheriff made the measurements. He was not present when the bills were posted. The defendant was not notified of the levy or of the proposed sale by the sheriff or by any one else before the 29th day of November, at nine o'clock in the evening. He swears he had no knowledge of the levy or sale before that evening. The letter from the attorney of the plaintiff speaks of a levy, but gives no intimation that the property is advertised for sale; and the defendant declares that his first knowledge of a sale was received on Saturday, the 1st day of December. The letter from plaintiff's counsel just mentioned was posted on the 28th of November and delivered to the defendant about nine o'clock on the evening of the 29th.

On Saturday, the 1st of December, the defendant saw his counsel and requested him to make a claim for the exemption. On Monday, the 3d of December, counsel filed the claim with the sheriff. On the 4th of December the sheriff had the appraisement made. The appraisers found that the three tracts of land were worth less than three hundred dollars. The sheriff then declined to go on with the sale. He made return of the writ to the court setting forth his proceedings in full, and also returned the appraisement itself.

The question raised by the exceptions is whether the claim for the debtor's exemption was filed in time.

We think a statement of the facts, as above set out, answers the inquiry in the affirmative. The defendant received his first notice on the evening of the 29th—Thursday, and on the following Saturday took steps to present his claim. Perhaps the circumstances were such that he ought to have known of the proposed sale before the 29th of November; but the fact that the writ, levy and advertisement were in the name of *Harry* Smith, when the defendant was always known by the name of Henry Smith, may have misled the community and kept the information from the defendant. The judgment was entered against Henry Smith.

In passing upon the question of due diligence on the part of the defendant, we must not forget the speed with which these proceedings were pushed along. If the levy was made on the 14th of November, then the sale was fixed to take place twenty-two days after the levy, and was advertised the same day the levy was made. The defendant could not well claim his exemption before the expense of

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advertising was incurred, for he did not meet the deputy sheriff, received no notice, was not an occupant of the premises, and received no information from the man who had the use of the barn. Every dollar of expense incurred by the sheriff was fixed before the defendant could have made his claim. The last expenditure was the posting of the bills on the 23d. This was the only act which was calculated to bring home notice to the defendant. Binder was not a tenant, and had no use or interest in any one of the three tracts save that he occupied the barn located on one of the lots.

Even if he is to be treated as a tenant whose duty it was to protect his landlord, still the fact remains that he did not notify the defendant; at least the evidence is silent upon this point, and the defendant's testimony stands unimpeached. If the advertisements had been made as the law contemplates, no doubt the defendant's attention would have been attracted at an earlier day. Probable purchasers of real estate are usually found in the neighborhood of the premises or within a reasonable distance therefrom. The same is true as to the creditors of the defendant who may be interested in the property. One of the newspapers selected, if possible, should be chosen so as to meet these conditions. We called the sheriff's attention to this matter in a previous case. The sale was not delayed because of a late claim. An earlier claim would have dispensed with a sale. The effect would have been the same in either event, because the properties were worth less than three hundred dollars.

The exemption act is a humane law, and as such is entitled to a liberal construction. If in this case we deprive the defendant of its benefits, we do so without any apparent neglect or wrong on his part. In allowing it, we do not disregard any right of the creditor.

We have recited the facts and circumstances fully in this case, because we are aware that by the rules ordinarily applied the claim came too late. No fixed and unvarying rule can be laid down as to the time when the claim must be made: Moore vs. McMorrow, 5 Pa. Super. Ct., 562. All the circumstances must be considered before we can determine whether the sale was in fact delayed or whether costs were incurred which by reasonable diligence the debtor could have avoided. Ignorance of the levy is one of the grounds which will justify a delay: Diehl vs. Holben, 39 Pa., 213. The rule that a claim should be made before the expense of advertising is incurred,

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has no application where there is a waiver of inquisition in the warrant of attorney confessing judgment and an immediate advertisement: Moore vs. McMorrow, *supra;* and in a case of this kind the claim is in time even if made after the expenses of advertisement are incurred: Snyder vs. Schmick, 166 Pa., 429.

The late day upon which the execution was issued compelled the sheriff to avail himself of the provision of the law which allows him to sell within six days after the return day. The failure to file the appraisement in court before the return day of the writ, as is directed by our rule of court, can not defeat the claim. The rule is inapplicable where a valid claim is made on or after the return day.

And now, January 9, 1901, the exceptions to the appraisement of the exemption are dismissed.

IN EQUITY.

THE REAL ESTATE TITLE INSURANCE AND TRUST COMPANY OF PHILADELPHIA, EXECUTOR OF THE LAST WILL AND TESTAMENT OF GEORGE W. GROSS, DEC'D, VS. MICHAEL V. MAGUIRE.

Equity will not exercise the very delicate power of setting aside executed obligations and conveyances of property in the absence of reasons that are specially operative. Declarations to third parties by the grantor of his intent to convey his property to the defendant to take care of him, and similar expressions, are competent to meet the allegations of undue influence in executing such conveyance.

The relation of boarder in the family of the defendant raises no trust or confidential relation between the parties.

FINDING of facts and conclusions of law on final hearing. No. 8, June T., 1900.

J. P. Hale Jenkins, Esq., for plaintiff.

Larzelere, Gibson & Fox, Esqs., for defendant.

Opinion of the court by SWARTZ, P. J., January 7, 1901.

On the 9th day of May, 1900, George W. Gross granted and conveyed a house and lot situate in Abington township to Michael V. Maguire in fee. George W. Gross died on the 11th day of August, 1900. His executor alleges that the conveyance to the defendant was fraudulent because the grantor was not mentally competent to

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make the deed and because of undue influence on the part of the defendant. The present bill in equity was filed to compel the defendant to reconvey the premises to the plaintiff and to declare the deed of May 9, 1900, void and of no effect.

FINDING OF FACTS.

First. George W. Gross was born January 30, 1821. In 1897 he occupied the premises now in controversy. He was without wife or children; and on the 4th day of October, 1897, he leased said house and lot to the defendant. The consideration in the lease was the board, washing and mending for the lessor, who was also to have the use of a room or rooms. The lease was to expire on the 1st day of April, 1898. The defendant performed his part of the contract faithfully and to the entire satisfaction of his landlord. The parties continued under the same contract and agreement until May 9, 1900, without a renewal of the lease.

Second. On said 9th day of May, 1900, George W. Gross conveyed the premises fully described in the first paragraph of plaintiff's bill to the defendant, being the same property covered by the lease of October 4, 1897. The consideration in the deed was one dollar; but the conveyance was made upon the express condition that "the grantee is to and agrees to keep, maintain, support and nurse the grantor during his natural life." The property so conveyed had a market value of thirty-five hundred dollars. Under a favorable sale it might have brought four thousand. At the time of the execution of the deed the grantor was the owner of other real and personal property valued at twelve thousand dollars.

Third. On the 31st of January, 1900, George W. Gross had a stroke of apoplexy. He was unconscious for a few days. He had a second stroke on February 16, 1900, but recovered his consciousness in a few days. He had a third stroke on the 11th of May, two days after the execution of the deed in question. He died on the 11th of August, after a fourth stroke on the 2d day of that month. His last illness began on January 31st, and the doctor attended him from that date to the time of his death. His condition varied very much. The attacks as they wore off enabled him to move about, read the newspapers, and talk intelligently. He was not as strong mentally or physically as he had been prior to January 31, 1900. On May 9th, and some days prior thereto, he was in a better condition

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than in January, February and March. About the time of the conveyance he was fully able to comprehend the extent and character of his property, and understood what he was doing.

Fourth. The deed was written in the presence of the grantor and explained to him in the absence of the defendant. The justice of the peace, who was present during the reading of the deed, also asked him if he understood what he was doing. The justice cautioned him that the defendant was getting the best of the bargain. The old gentleman stated that he knew what he was doing, that he expected to live for some time, and that the defendant deserved all he was receiving. We find that the grantor had sufficient mental capacity to comprehend the act he was doing; that he understood the full effect of the deed he handed to the defendant. He carried out the purpose he had cherished for some time. He intended to compensate the defendant and his wife for the faithful nursing and services rendered, and at the same time to show his appreciation for their kindness to him and to secure its continuance to the end of his life. He knew the character of the services already bestowed, and had every reason to think that similar duties and attentions would be required in the future.

Fifth. There is no evidence whatever to sustain the allegation of undue influence.

Sixth. The old gentleman was miserly in his habits and slovenly in his dress, and believed that his relatives were ashamed of him and indifferent to his welfare. There is no evidence that his opinion of his relatives was not well founded in fact. The defendant supplied the grantor's needs to his entire satisfaction, and the deed, so far as it was voluntary, was a gift expressing his appreciation and good will toward the defendant and his wife.

Seventh. The grantor's attention was not specifically directed to the fact that the deed was irrevocable if the defendant kept his covenants; still, his conversation at the time of the execution of the instrument, taken in connection with his oft expressed intent to take care of the defendant and his wife, satisfies us that he fully understood that he parted with his property beyond recall.

CONCLUSIONS OF LAW.

First. The declarations of the grantor that he intended "to transfer the property to the defendant," and similar expressions, were

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competent to meet the allegations of undue influence. They were also competent to show that it was the grantor's cherished purpose to make an absolute, irrevocable transfer of the property.

Second. The relation of boarder in the defendant's family raises no implication of a confidential relation which the court can consider in the application to set aside the conveyance. But if the burden was upon the defendant to show that no advantage was taken of the grantor, and to show that the latter fully comprehended the act he was doing, the evidence submitted answers every demand of the law to sustain the validity of the deed.

Third. Under our findings of fact, the allegation of fraud, undue influence, mental incapacity and misrepresentation are not sustained, and the defendant's title to the premises in question is good and valid and can not be set aside.

Fourth. The bill should be dismissed at the cost of plaintiffs.

We answer the request of the plaintiff for certain findings of fact, as follows:

The first, second, third, fourth, fifth and sixth findings are approved and found correct.

The seventh is also approved, except that we can not say that the said George W. Gross continued to let and demise the premises in question after May 9, 1900.

The eighth finding is also approved and found correct.

The ninth finding is not approved, and is refused.

The two requests for conclusions of law are not found correct, and are refused.

ARGUMENT IN SUPPORT OF OUR FINDINGS.

The evidence in support of the validity of this deed is so full and convincing that the case is free from all legal difficulties.

There was no attempt to support the allegation of undue influence, and the only witness called to impeach the mental capacity of the grantor failed to sustain the plaintiff. Dr. Heritage was, in fact, a witness proving mental capacity to execute the deed.

All the witnesses present at the transfer of the title testify that the grantor understood the act he was doing, and was mentally competent to make the deed. They give his conversations and acts, and they sustain the conclusions of the witnesses.

The evidence of Mrs. Lovejoy and Mrs. Beardsly shows that

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the old gentleman was unusually active on the 8th and 9th of May. He was able to walk about, and visited them in the afternoon of the day the deed was executed. They conversed with him, and had abundant opportunity to note his mental condition and capacity. Their evidence corroborates the witnesses present at the execution of the deed.

The declarations to several witnesses, from time to time, of the grantor's intent to convey the property to the defendant to take care of him, and similar expressions, were competent to meet the allegations of undue influence. They show that the execution of the deed was in accordance with a long-cherished purpose of the grantor: Neel vs. Potter, 40 Pa., 483.

That there is no relation of confidence between a landlord and tenant, or boarder and landlord, is shown in Doran vs. McConlogue, 150 Pa., 98. But, as already stated, if there was any burden cast on the defendant by reason of the existing relationship, he has fully met and answered it by the evidence offered. Courts will not exercise the very delicate power of setting aside executed obligations and conveyances of property in the absence of reasons specially operative: Doran vs. McConlogue, *supra*. We find no such special reasons in this case. The testator parted with one-fourth of his property—not with his entire estate. He retained more than sufficient to meet the demands which he conceived his relatives might have upon his bounty. After naming these relatives in his will, and fixing their pecuniary legacies, he had great difficulty in selecting any other beneficiary, and finally imposed this duty upon his executor. It is not surprising that under such circumstances he should bestow his bounty upon the family he held in such high regard and from whom he received such faithful care and nursing.

And now, January 7, 1901, it is ordered that the Prothonotary enter a decree nisi dismissing the bill at the costs of the plaintiff; and unless exceptions are filed, as provided by the equity rules, he will enter a final decree as of course.

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IN EQUITY.

THOMAS LEWIS vs. WILLIAM H. SMITH.

A parol agreement for the exchange of lands established by clear, precise and indubitable evidence, and consummated by actual possession, is not within the statute of frauds: Brown et al. vs. Bailey et al., 159 Pa., 121.

An agreement being made for an exchange of lands, plaintiff and defendant posted stakes and erected fences. Plaintiff also made improvements on and entered into possession of the land he was to receive. Defendant employed a surveyor to make a survey, and told him he should go according to the fences he and plaintiff had agreed upon. Upon defendant's refusal to convey, an order was made for specific performance.

No. 2, June T., 1900.

Evans, Holland & Dettra, Esqs., for plaintiff.

Hillegass & Larzelere, Esqs., for defendant.

Opinion of the court by WEAND, J., January 28, 1901.

HISTORY OF THE CASE.

The bill is brought to enforce specific performance of a parol contract for the exchange of lands.

Plaintiff and defendant were the owners of land fronting on Union avenue, in Cheltenham township, the land of defendant also abutting on Chelten avenue. Fronting on Chelten avenue was a property owned by Hannah M. Bower, adjoining the properties of plaintiff and defendant, from which it was separated by a fence. The plaintiff and defendant each desired to obtain a portion of the Bower property, and by so doing their properties would have a greater depth.

It was agreed that plaintiff should purchase the entire Bower property, and as he wished to enlarge the dwelling-house on it defendant agreed to convey to him part of his Chelten avenue front and receive in return a part of the Bower lot. The land was to be valued at five cents per square foot, the one receiving the greater quantity to pay the difference. Plaintiff did make the purchase, and stakes were driven and a fence erected (C to A on Exhibit C) to define the bounds of the land to be received by plaintiff from defendant and by defendant from plaintiff. Plaintiff then commenced the addition to the house by extending it over the former line between Bower and defendant; in the work defendant assisted in digging a cellar, and his son, who lived with him but was in the employ of the plaintiff, assisted in the entire work. The frontage thus fenced off

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was twenty-five feet on Chelten avenue running back at an angle to a point on defendant's line, and is embraced in Points A, B, C, on Exhibit C. Plaintiff has been in possession ever since.

The portion of the purchased property to be conveyed to defendant was also staked off and fences erected, and some sheds, a chicken-house, etc., built thereon, and used, at least in part, by defendant. This ground is embraced in Points E, H, K, L, G and D on Exhibit C. Defendant, however, waived his right to the entire quantity of land to which he was entitled, and agreed that plaintiff might retain a portion of it, and on this part plaintiff erected a barn. The purchase of the Bower property was consummated in 1897, and the extension to the house completed in early 1898. Plaintiff and wife executed and acknowledged a deed for the land which defendant was to receive and tendered him the same, and demanded a conveyance of the property which plaintiff was to receive, but defendant refused so to do. Defendant furnished the data from which to make the surveys and prepare his deed. The plaintiff asks for a decree compelling defendant to complete the agreement.

FINDINGS OF FACT.

1. Plaintiff purchased Bower property under a parol agreement with defendant that the latter would convey to the former a portion of his lot fronting on Chelten avenue, so that plaintiff could make an addition to the dwelling-house on the purchased property.

2. That the Bower property extended along the rear of the properties of plaintiff and defendant, both of whom would be benefited by the proposed purchase and exchange.

3. In exchange for the portion of defendant's lot, fronting on Chelten avenue, he was to receive a portion of the Bower lot, so as to increase the depth of his property fronting on Union avenue.

4. That the portion to be conveyed to plaintiff by defendant and that to be conveyed by defendant to plaintiff were staked off and fences erected, and agreed to by both parties.

5. That plaintiff, with knowledge and acquiescence of defendant, occupied a frontage of twenty-five feet of defendant's land on Chelten avenue, on which he extended the addition to the old Bower house, and that defendant knew of the extent of front taken and never objected thereto until March 6, 1900.

6. That plaintiff paid to defendant money on account of the

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difference in quantity, and has been in undisputed possession of the land claimed by him since 1898.

7. That defendant acknowledged the lines, fences, as marking the ground to be given and received.

8. That defendant ordered surveys to be made according to the posts, stakes and fences erected to define the boundaries already on the ground.

9. That his only ground of refusal to complete the agreement was that he had not been paid enough for the part which he agreed plaintiff should retain for his barn.

10. Plaintiff has overpaid defendant for any difference in value.

11. Plaintiff has made tender of a deed to defendant for the part the latter is entitled to receive, which defendant refuses to accept. A record was also prepared for defendant to sign conveying to plaintiff the land he was to receive, but defendant declines to execute the same.

12. Defendant took possession of the lot he was to receive and used the same for his own purposes.

13. Defendant admits in his answer that he made a parol agreement with plaintiff for an exchange of lands differing in terms and extent from that claimed by plaintiff, but does not aver a willingness to comply with the agreement even on his own terms, but asks that plaintiff's bill be dismissed.

14. After the lines were fixed plaintiff was absent from the country for ten months, during which time defendant had charge of his horse, cart, etc., but never changed the fences or did anything showing dissent until March 6, 1900, when he wrote a letter demanding more money.

15. There has been erected on the lot to be received by defendant sheds, chicken-houses, etc., for his use, and he has used the same for his own purposes.

16. Mr. Penrose held a mortgage against the Bower lot, and Mrs. Comly one on the Smith lot. Part of the agreement was that each party was to obtain a release of mortgage. Mr. Hunter, as agent for Smith, obtained consent of Mrs. Comly to release her mortgage, and Mr. Penrose for Lewis agreed to do the same.

17. The contract has been so far executed as that plaintiff can not be compensated in damages.

18. The part to which plaintiff is entitled is embraced in the

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angle marked A, B, C, on Exhibit C; and the part to which defendant is entitled is embraced within the lines marked E, H, K, L, G and D on same exhibit.

CONCLUSIONS OF LAW AND ARGUMENT.

The evidence discloses a parol agreement for the exchange of lands followed by payment of purchase money, improvements made, and undisputed possession for several years.

The bill asks for a conveyance from defendant to plaintiff. The argument made, that possession must be exclusive, is not applicable, for the evidence shows conclusively that plaintiff has had exclusive possession of the part claimed by him; and the fact, even if conceded, that defendant has not had exclusive possession of the part to be conveyed to him, will not prevent a decree in proper form. We find, however, that defendant has been in possession of the part to which he was entitled; and if plaintiff has used it in part, it was with consent of defendant.

The claim that plaintiff has taken more front than it was agreed he should receive can not be sustained; and, at all events, defendant is estopped, for he stood by and saw plaintiff build upon the lot and agreed to the lines when he directed a survey to be made and a deed to be prepared according to the fences and posts already in place. His contention that he is not receiving what he expected is also untenable, for he waived his right to part of the ground set apart and staked off for him, and demanded and received pay therefor. If the lot should be located, as he claims, nearer Chelten avenue, he would have no claim to be paid for the ground on which plaintiff erected his barn; and because he did not receive enough for this very ground, he objected to signing a deed when requested so to do by the conveyancer.

The fact that Mr. Smith never took any measures to remove the fences or to recover possession of any excess of land claimed to be occupied by plaintiff, is evidence of his acquiescence. Plaintiff was absent for ten months, when defendant could have taken forcible or peaceable possession, but did not do so.

There was no evidence of values to show that defendant is not getting a fair equivalent. Defendant's son during the whole time worked for plaintiff and helped to extend the house and erect the fences, but never suggested to his father to remonstrate with plain-

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tiff as to the extent of front taken. Up to January, 1900, defendant was willing to convey as claimed by plaintiff, for he then called on Mr. Hunter, the surveyor, who had been doing business for him, and ordered a survey according to a sketch which he furnished Mr. Hunter, and he then said "the fences had been put just the way that he and Mr. Lewis had agreed upon, and that he (Mr. Hunter) would find them that way on the ground, and all that I would have to do would be to make the measurements as I found the fences." When the surveyors went upon the ground they found the fences, posts, etc., substantially as defined on the sketch furnished by defendant. Under the evidence and the law (see Brown et al. vs. Bailey et al., 159 Pa., 121), we conclude that plaintiff is entitled to a decree for specific performance, and upon the preparation of a proper decree by plaintiff's counsel, to be first submitted to defendant's counsel, decree will be made in conformity to the prayer of plaintiff's bill.

MATTA E. LIEBER VS. WALTER S. LIEBER AND J. BONDINE BUTLER LIEBER.

Where one of two defendants in ejectment files a disclaimer of title, the plaintiff is entitled to a confession of judgment from him or a plea of not guilty before the trial of the issue with the other defendant begins.

A conveyance is not fraudulent as to subsequent creditors unless an intent to defraud them is shown. Fraud as to existing creditors raises no presumption of fraud as to a creditor who had no existence when the conveyance was made.

MOTION and reasons for a new trial. No. 84, March T., 1899.

H. C. Boyer, Esq., for plaintiff.

William M. Meredith and *N. H. Larzelere, Esqs.*, for defendants.

Opinion of the court by SWARTZ, P. J., January 7, 1901.

Walter S. Lieber filed a disclaimer for all the land described in the plaintiff's suit. Before the jury was sworn as to the other defendant, the counsel for plaintiff demanded judgment or a plea of "not guilty" from the defendant, Walter S. Lieber. This was asking no more than the plaintiff had the right to exact: Bratton vs. Mitchell, 5 Watts, 70. Under the agreement made at bar and entered upon the notes of trial, the court enters judgment against

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the defendant, Walter S. Lieber, as of the time immediately before the jury was sworn. It was agreed that no advantage should be taken of the plaintiff by reason of the failure to entertain and act on the motion made by his counsel. Under the agreement he is entitled to the judgment against Walter S. Lieber. It is the only entry that will properly protect the plaintiff in his rights when the motion for judgment was entered.

We instructed the jury to enter a verdict in favor of the other defendant, the wife of Walter S. Lieber. We did so after hearing all the evidence offered by both plaintiff and defendant. Upon further examination of the testimony and consideration of the case, we find no reason for any change in our conclusions.

On the 8th day of June, 1896, Walter S. Lieber conveyed the property in question to J. B. Butler, the other defendant, who was then his affianced wife, and whom he married sixteen days after the conveyance. The consideration named in the deed is one dollar, but the property was subject to a mortgage of nine hundred dollars; the equity in the premises was valued at one thousand dollars.

The husband gave the deed to his wife as a wedding present. He owned other real estate in the West. At the time of the conveyance Walter S. Lieber was in partnership with his brother, Moreau Lieber. The business was an extensive one, and they contemplated an enlargment and did in fact enter into new quarters about November, 1896, at an increased rental.

Moreau Lieber says the firm was insolvent before they removed to the new building of Mr. Snellenburg, and at the time the conveyance was made on June 8, 1896. This is denied by Walter S. Lieber, who says the firm was not insolvent during his membership. Walter retired from the firm on January 17, 1897.

The proof of the insolvency is very slight. The denial of Walter is supported and confirmed by the surrounding circumstances. If the firm was in distress for want of sufficient capital to continue the old business, it is improbable that its members would at once enter a larger field requiring still greater means to carry on the business. Again, it seems unreasonable that Moreau, at the time of the dissolution, should assume all the liabilities of the firm and indemnify his brother against all exisiting obligations, and pay him in addition five hundred and fifty dollars for his interest in the firm, if in fact the business was insolvent at the time.

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It is not clearly shown that there was fraud in law or fact, even as to existing creditors. Certainly there was no fraud in fact except so far as any future liability might arise under the ten-year lease with Mr. Snellenburg, and this was a firm contract existing at the time of the conveyance on June 8, 1896. All evidence of fraud is confined to the rentals which may full due on this Snellenburg lease.

The debt of the plaintiff was not contracted until May 17, 1898; that is, two years after the conveyance by Walter S. Lieber to his wife. It was upon this debt that the plaintiff obtained her sheriff's deed. If the evidence as to fraud against existing creditors is unsatisfactory, except as to the Snellenburg lease, the proof of fraud as to future creditors is wholly wanting.

Walter S. Lieber retired from the firm in January, 1897, by reason of ill health and disagreements with his co-partner. He lived with his wife on the premises in question, and engaged in raising chickens on their little home and lot of nine acres. He continued in this retired occupation in the hope of regaining his health. He did not contemplate, at the time he left the firm, reëntering into any commercial pursuit. After sixteen months of this retirement, he was visited by the plaintiff, his sister-in-law. She was in the stove business at Seventh and Arch streets, Philadelphia. She applied to him to buy her out, and after some negotiations the sale was consummated. Her debt upon which she sold, at sheriff's sale, the premises now in controversy, arose out of this transaction.

Walter S. Lieber and his brother commenced the stove business in this Arch street store before they removed to Market street, where the firm dissolved. They were successful in this smaller undertaking and used it as a stepping-stone to the larger field on Market street. There is no evidence that Walter S. Lieber engaged in a hazardous business when he reëntered the old store. He was familiar with the business, had been successful in former years at this place, and the undertaking was small compared with that which he left on Market street when he retired to his country home.

A statement of these undisputed facts shows that the court could not submit the case and allow the jury to find that which did not exist—fraud as to this subsequent creditor, by the conveyance made more than two years before her debt originated.

If we concede that the conveyance of June 8th was voluntary;

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and by an insolvent or one in embarrassed circumstances, still the plaintiff may not recover, for her debt was not in existence nor in contemplation at the date of the conveyance.

There must be an intent to defraud subsequent creditors; a conveyance is bad only as to those it was intended to defraud: Buckley vs. Duff, 114 Pa., 596. Fraud as to existing creditors raises no presumption of fraud as to a creditor who had no existence when the conveyance was made. If the fraud exists as a fact, the creditor is bound to prove it: Best vs. Smith, 193 Pa., 93. "A deed void as against existing creditors does not even raise a suspicion of fraud as against creditors whose debts had no existence when it was made": Harlan vs. Maglaughlin, 90 Pa., 293; Best vs. Smith, 193 Pa., 92. It is not sufficient to show that the grantor subsequently engaged in business. Non-existing creditors may avoid the deed only under special circumstances, as, for instance, by showing that it was made with a view of incurring liability, or to provide against the contingencies of a hazardous business which gave rise to their debts: Buckley vs. Duff, 114 Pa., 596.

How can we say that by the deed there was an intent to defraud this plaintiff, when the business which gave rise to her debt was not in contemplation until two years after the deed was executed?

And now, January 7, 1901, the reasons for a new trial are dismissed and a new trial is refused.

J. P. Hale Jenkins vs. Charles H. Luther.

A purchaser in possession under title acquired by a sheriff's deed, can not be compelled to deliver up the deed to be cancelled upon a rule to show cause.

If the title was procured by a fraud upon the petitioner, an action of ejectment or bill in equity is the proper remedy.

The court can not on a rule to show cause against a purchaser at sheriff's sale strike off a judgment so as to make a mortgage, otherwise divested, a fixed lien.

If such judgment was no lien, the mortgage was not affected; if the judgment was only voidable, it could not be attacked collaterally.

No. 35, December T., 1900.

J. P. Hale Jenkins, Esq., for plaintiff.

Opinion of the court by Weand, J., January 11, 1901.

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The petitioner, Mrs. Linn, alleges that as owner of real estate she brought suit in the Court of Common Pleas against the township of Montgomery, in which there was a verdict for defendant, and on which verdict the prothonotary entered judgment against her, as plaintiff, for the costs—$158.77.

Subsequently, plaintiff sold the premises to James F. Loughery, taking in part payment a mortgage for $1,000. Afterwards the property became vested in one Charles H. Luther, who confessed a judgment to plaintiff, Jenkins, for $158, the amount of the costs in the township suit. Upon this latter judgment an execution was issued, and at the sheriff's sale the property was purchased by plaintiff, who was counsel for the township in the suit brought by Mrs. Linn. A deed was duly acknowledged to Mr. Jenkins, and he is in possession of the premises. The price paid by plaintiff was fifty dollars. If the judgment entered against Mrs. Linn for costs was a valid judgment and a lien, the sheriff's sale divests the lien of her mortgage.

Alleging that Loughery was to satisfy the judgment as part of his consideration for his purchase, that Jenkins took judgment from Luther for the amount of said judgment for costs, that she did not know that the first judgment was never satisfied, and that Jenkins in taking his judgment accepted it in payment of the other, she now asks that the sheriff's sale and acknowledgment of the deed be set aside, in order that her mortgage may be protected. On the hearing she further asked that the judgment entered on the verdict against her be stricken from the record as of December 1, 1900, and also that the verdict should be marked satisfied *nunc pro tunc* as of November 7, 1900.

We can not set aside this sale. By it plaintiff has a vested interest in the property, and petitioner's rights can not be asserted in this manner.

If her contention is correct that the judgment against her for costs is void as not being warranted by law, and therefore no lien, then her mortgage is not affected. If voidable only, it can not be attacked collaterally. If she alleges fraud or a combination to her prejudice, a bill in equity to establish her mortgage as a lien is the proper remedy. The matter in one aspect is too delicate for us to discuss until it comes before us in a proper proceeding.

For authority on the question of our right to set aside the sale,

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REGISTER'S NOTICE.

REGISTER'S NOTICE.

MONTGOMERY COUNTY.

Norristown, Feb. 2, 1901.

All persons concerned, either as heirs, creditors or otherwise, are hereby notified that the accounts of the following named persons have been allowed and filed in my office on the date to each separately affixed; and the same will be presented to the Orphans' Court of said county, on MONDAY, the 4th day of March, 1901, at 10 o'clock a. m., for confirmation, at which time and place they may attend if they think proper.

B

BITTING—Feb. 1.—First and final account of William Bitting, adm'tor of the estate of Charles H. Bitting, late of Pennsburg, dec'd.

BOYLES—Jan. 23.—Account of Joseph S. Parry, ex'tor of the estate of Mary Ann Boyles, dec'd.

BREY—Jan. 25.—Final account of Henry G. Markley, ex'tor of the estate of Sophia Brey, late of Upper Hanover township, dec'd.

BUEHLER—Feb. 2.—First and final account of the Norristown Title, Trust and Safe Deposit Company, trustee for Mary J. Suesserott, under the will of Martin Buehler, late of Montgomery county, Pa., the said Mary J. Suesserott, the life tenant, being also now deceased.

BUSTARD—Feb. 2.—First and final account of Charles Bustard, Jr., adm'tor of the estate of Charles Bustard, late of Moreland township, dec'd.

C

CHRISTMAN—Dec. 15.—First and final account of Jacob B. Christman, adm'tor of the estate of Mary S. Christman, late of Pottstown, dec'd.

CUSTER—Jan. 16.—First and final account of Margaret H. Custer, adm'trix of the estate of Philip B. Custer, late of Whitpain township, dec'd.

CLEGG—Jan. 24.—First and final account of The Norristown Title, Trust and Safe Deposit Co., adm'tor of the estate of Mary C. Clegg, late of Washington county, state of Iowa, dec'd.

CONN (nee HALLOWAY)—Jan. 26.—Account of David M. Jarrett, guardian of Mrs. Elizabeth Conn (nee Halloway), minor child of William H. Halloway, dec'd, said minor having arrived at the age of 21 years.

CONRAD—Jan. 26.—First and final account of The Albertson Trust and Safe Deposit Co., ex'tor of the estate of Phebe W. Conrad, late of Norristown, dec'd.

COULSTON—Jan. 30.—First and final account of Kate C. Coulston, adm'trix of the estate of William C. Coulston, late of Whitemarsh township, dec'd.

CLAYTON—Jan. 31.—First and final account of Conrad Clayton, adm'tor de bonis non of the estate of Maria Clayton, late of Gwynedd township, dec'd.

D

DANEHOWER—Nov. 20.—First and final acount of B. F. Danehower, ex'tor of the estate of Lizzie J. Danehower, late of Lower Gwynedd township, dec'd.

REGISTER'S NOTICE

DeGHEQUIER—Dec. 14.—First and final account of the Merion Title and Trust Company, of Ardmore, Pa., adm'tor of the estate of Antonio DeGhequier, late of Lower Merion township, dec'd.

DANENHOWER—Nov. 20.—First and final account of Lewis W. Danenhower, adm'tor of the estate of Mary Danenhower, late of Abington township, dec'd.

F

FAUST—Jan. 28.—Account of Ralph E. Shaner, adm'tor of the estate of Wm. Faust, late of Pottstown, dec'd.

FISHER—Jan. 29.—First and final account of Jacob S. Daub, adm'tor d. b. n. of the estate of Jonas Fisher, late of Frederick township, dec'd.

FROMHAGEN—Jan. 30.—First and final account of Albert K. Kneule, adm'tor of the estate of Albert Fromhagen, late of Norristown, dec'd.

G

GERGES—Feb. 2.—First and final account of Abraham B. Gerges, ex'tor of the estate of Henry Gerges, late of Lower Salford township, dec'd.

GOEBEL—Nov. 17.—First account of Nicholas Boebel, adm'tor of the estate of Elizabeth F. Goebel, late of Pottstown, dec'd.

GARBER.—Dec. 21.—First and final account of Charles H. Howell, ex'tor of the estate of Margaret E. Garber, late of Upper Providence township, dec'd.

GODSHALL—Jan. 14.—First and final account of William J. Bean, trustee for Elizabeth Rosenberger, under the will of Dillman H. Godshall, late of Skippack township, dec'd.

H

HAAS—Dec. 15.—First and final account of Sarah A. Haas, ex'trix of the estate of James C. Haas, late of North Wales, dec'd.

HEEBNER—Dec. 27.—First and final account of Isaac D. Heebner, Josiah D. Heebner, Jacob D. Heebner and William D. Heebner, ex'tors of the estate David S. Heebner, late of Lansdale, dec'd.

HEIST—Jan. 28.—First and final account of John C. Heist, surviving ex'tor of the estate of Mahlon V. Heist, dec'd.

I

IPPOLITE—Dec. 17.—First and final account of Grant R. McGlathery, adm'tor of the estate of Giovanni d'Ippolite, late of Norristown, dec'd.

J

JAGGARD—Dec. 20.—Second account of Edwin A. Jaggard, et al., ex'tors of the estate of Annie J. Jaggard, late of Lower Merion township, dec'd.

JONES—Feb. 2.—First and final account of William Potts Jones, adm'tor of the estate of Anna P. Jones, late of Conshohocken, dec'd.

K

KILLIAN—Dec. 4.—First and final account of Ann Killian and Michael Killian, adm'tors of the estate of Michael Killian, late of Upper Dublin township, dec'd.

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AUDITORS' NOTICES.

KLINE—Dec. 15.—First and final account of Carrie G. Kline, ex'trix of the estate of Peter A. Kline, late of Lansdale, dec' d.

KULP—Jan. 16.—First and final account of Emma C. March, ex'trix of the estate of Maria Kulp, late of Pottstown, dec'd.

KRATZ—Jan. 28.—First and final account of Hiram K. Kriebel, guardian of Irwin S. Kratz, minor child of Daniel C. Kratz, late of Upper Gwynedd, now of full age.

KNAPP—Jan. 28.—First and partial account of Charles S. Knapp and Thomas J. Knapp, ex'tors of the estate of Mary Knapp, late of Montgomery township, dec'd.

KNAPP—Feb. 1.—Account of Catharine T. Knapp, adm'trix of the estate of Gorge A. Knapp, dec'd.

L

LEIDY—Dec. 15.—First and final account of Catharine Leidy and Milton H. Leidy, ex'tors of the estate of Thomas Leidy, late of Souderton, dec'd, filed by Milton H. Leidy, acting executor.

LAYMAN—Jan. 30.—First and final account of Ellwood Hoot, adm'tor of the estate of S. Ellwood Layman, late of Upper Gwynedd township, dec'd.

M

MAIR—Nov. 22.—First and final account of Wm. M. Hall, ex-tor of the estate of William Mair, late of Conshohocken, dec'd.

MANN—Dec. 13.—First and final account of Emma Raab, adm'trix of the estate of Anna Bella Mann, late of Moreland township, dec'd.

METZ—Jan. 5.—First and final account of Josiah G. Gerhart, guardian of John B. Metz, a minor son of George and Elizabeth Metz, late of Salford township, dec'd.

MOLONY—Jan. 16.—First and final account of The Montgomery Insurance, Trust and Safe Deposit Co., of Norristown, Pa., who was successor to Benton Molony, trustee of Ellen Phillips, in the estate of Joshua Molony, late of Norristown, dec'd.

MAYNES—Jan. 28.—First and final account of John J. Maynes, ex'tor of the estate of Anna A. Maynes, late of Upper Dublin township, dec'd.

MOYER—Jan. 31.—First and final account of Wallace Moyer, adm'tor of the estate of Abraham L. Moyer, late of Norristown, dec'd.

MATTIS—Feb. 1.—First and final account of Muscoe M. Gibson, adm'tor of the estate of Mary A. Mattis, late of Ambler, dec'd.

MANCILL—Feb. 2.—First and final account of May H. Mancill and Adam Scheidt, ex'tors of the estate of Francis S. Mancill, late of the borough of Norristown, dec'd.

MARCH—Feb. 2.—Account of William H. March, guardian of Jennie R. March, late minor child of William Oberholtzer, and widow of Frank J. March, late of Pottstown, dec'd.

REGISTER'S NOTICE.

MILLER—Feb. 2.—First and final account of David H. Miller, adm'tor of the estate of Hannah S. Miller, late of Conshohocken, dec'd.

N

NACE—Dec. 14.—First and final account of The Albertson Trust and Safe Deposit Company, guardian of Emma Nace, a minor child of David B. Nace, dec'd; she having arrived at the age of 21 years.

NICE—Jan. 23.—First and final account of Cynthia J. Nice, John M. Bocklus and Thomas C. Coltman, ex'tors of the estate of Thomas Nice, late of Jenkintown, dec'd.

NICE—Feb. 2.—Account of Mary C. Nice, adm'trix of the estate of Jesse L. Nice, dec'd.

P

PASELELLO—Dec. 17.—First and final account of Grant R. McGlathery, adm'tor of the estate of Alfred Pastiello, late of Horsham township, dec'd.

POTTER—Feb. 2.—First and final account of Jacob L. Tyson, guardian of Charlotte F. Potter, Franklin F. Potter and Edith V. Potter, now wife of George Ridpath, children of Robert E. Potter, dec'd, now all of age.

R

ROGERS—Nov. 17.—First and final account of S. B. Latshaw, guardian of Clarence M. Rogers, late a minor child of Albert Rogers.

RAWLINS—Nov. 22.—First and final account of Walter W. Hood, executor of the estate of Eleanor Rawlins, late of Lower Providence township, dec'd.

RICHARDS—Jan. 31.—First and final account of William B. Richards, ex'tor of the estate of Samuel S. Richards, late of Plymouth township, dec'd.

REX—Feb. 2.—Account of Jones Detwiler, guardian of Wm. B. Rex, a minor, as filed by Job E. Detwiler, adm'tor of Jones Detwiler, dec'd.

S

STYER—Nov. 20.—First and final account of Nathaniel R. Styer, adm'tor of the estate of Henry Styer, late of New Hanover township, dec'd.

SCATCHARD—Dec. 8.—First and final account of George E. Hoffman, adm'tor of the estate of Henry F. Scatchard, dec'd.

SMITH—Dec. 10.—First and final account of Henry S. Ellis, ex'tor of the estate of Catharine Smith, late of Upper Providence township, dec'd.

SMITH—Dec. 15.—First and final account Henry L Smith and John T. Smith, adm'tors of the estate of Mary Smith, late of Norristown, dec'd.

SPEELHOFFER (nee PIFER)—Dec. 19.—First and final account of the Norristown Title, Trust and Safe Deposit Company, guardian of the estate of Mrs. Ettie E. Speelhoffer, formerly Ettie E. Pifer, a minor child of Horace Pifer, late of the borough of Norristown, dec'd; said ward having attained the age of 21 years.

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and the proper remedy, see Evans vs. Maury, 112 Pa., 300; Media T. and T. Co. vs Kelly, 185 Pa., 131.

And now, January 11, 1901, the motion to set aside sale and acknowledgment of deed is overruled.

Court of Common Pleas of Bucks County.

IN EQUITY.

NATHAN P. BROWER VS. DAVIS E. BROWER.

A bill to enforce a parol trust in land also alleged that the defendant made an acknowledgment and declaration in writing to the effect that "the property was purchased for the joint use" of plaintiff and defendant, and that said paper was in possession of defendant. On demurrer it was *held*:

1. That the bill as originally filed alleged a parol trust, and was therefore covered by the express terms of the act of April 22, 1856, P. L. 533, Sec. 4.
2. That as there was no fraud in obtaining title, and as plaintiff had paid no part of the purchase money, there was no resulting trust; and if there was, it would be barred by the sixth section of the act of April 22, 1856.
3. That as there was no allegation that the acknowledgment was signed by defendant, it was not sufficient to avoid the statute.

No. 2, April T., 1900.

Opinion of the court by WEAND, Judge Thirty-eighth District, specially presiding, January 8, 1901.

I. P. Wanger and *Robert Yardley, Esqs.*, for plaintiff.

Henry Lear, Esq., for defendant.

The case was heard on defendant's demurrer to plaintiff's bill as amended.

The plaintiff alleges that in 1869 James Clark, Sr., agreed in writing to sell and convey to Jonathan Wonsitler certain real estate situate in Doylestown borough; that said Wonsitler, by writing dated August 26, 1869, agreed to stand seized of the said real estate in trust for the benefit of plaintiff and defendant in equal parts, and subsequently assigned all interest in the matter in favor of the parties to this suit. It is further alleged that it was agreed between the plaintiff and the defendant, for the sake of convenience in conveyancing, as well as for securing defendant in such advances as he

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might make over and beyond those made by plaintiff, that the title should be taken in the name of defendant to hold the same in trust for himself and plaintiff, each to have an equal interest therein as tenants in common; and that in pursuance of said agreements Clark and wife, by deed dated April 9, 1870, conveyed the premises to defendant in actual though unexpressed trust for the benefit of both parties. No part of the purchase money was paid by plaintiff, but part thereof was the proceeds of the sale of lands belonging to the estate of Christian Brower, deceased, of which estate defendant was one of the executors.

It is also alleged that plaintiff has sold part of the premises, for which he has never accounted to defendant; and that the estate of Christian Brower, deceased, has never been settled.

Subsequently plaintiff amended his bill by adding a new paragraph, 4½, alleging that shortly after the conveyance mentioned in the preceding paragraph, and at some time during the year 1870 the defendant made an acknowledgment and declaration in writing that the property mentioned in said Paragraph 4 was purchased for the joint use of your orator and himself, a copy of which written acknowledgment and declaration, and the date and month of its execution, "your orator is unable to give by reason of its being in possession of the defendant." The bill was filed in December, 1899.

The demurrer assigns the following reasons why the bill should be dismissed:

1. It does not state such cause as entitles plaintiff to the relief sought for, from or against the defendant.

2. That no declaration of trust or assignment, etc., was ever manifested in writing, signed by defendant, within the meaning of the statute of frauds.

3. That so much of the bill as seeks to enforce any implied or resulting trust is barred by the provisions of the sixth section of the act of April 22, 1856.

4. That the cause of action stated in the bill did not accrue within six years before the filing thereof, and is barred by the statute of limitations.

5. That by his laches the plaintiff has forfeited his right to equitable relief.

6. That the bill is multifarious.

The plaintiff's prayer is for a conveyance and an account of

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rents and profits. Unless he had an interest in the land arising from the purchase, he has no right to an account as prayed for, and his bill must be dismissed.

The bill as originally filed alleged a parol trust, and is therefore covered by the express terms of the act of April 22, 1856, P. L. 533, Sec. 4; Barnett vs. Dougherty, 33 Pa., 371.

It is not alleged that there was any fraud or *mala fides* in the original purchase; and the long line of cases covering this point show conclusively that the plaintiff's claim on this ground can not be enforced.

It is claimed, moreover, that the amended bill sets forth such an agreement in writing as will sustain the bill.

The act of 1856 required all declarations or creations of trust or confidences of any lands, tenements or hereditaments, and all grants and assignments thereof shall be manifested by writing, signed by the party holding the title thereof, or by his last will in writing, or else to be void, etc.

It is contended by defendant that the acknowledgment and declaration set forth in the bill is not sufficient to avoid the statute, because "there is no allegation that it was signed," nor that it was delivered or ever passed from defendant; that it does not set forth the terms or conditions of the trust, nor the proportions in which the parties are to hold the land, and is too indefinite to be enforced.

As there is no allegation that the declaration was signed by defendant, we can not assume that it was ever executed in the manner and form required by the act. Admittedly it remained in his possession and control, and is therefore not to be considered as an executed act. If we treat it as a solemn declaration of trust, we violate the plain term of the act which requires it to be signed; and if not signed, it is but a parol declaration.

It is, however, also open to the objection of indefiniteness, for it gives us no information as to its terms or conditions, and we could not enforce it. The ignorance of plaintiff as to its terms and meaning is convincing evidence that he never was assured of any rights under it, and its possession by defendant is also evidence that it was never intended to be effectual. We think Dyer's Appeal, 107 Pa., 446, rules the question against the plaintiff. In that case it was never said: "Where a bill in equity is filed to establish a trust in lands, tenements or hereditaments, the written evidence thereof re-

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quired by the act of April 22, 1856, should contain within itself all that is necessary to enable the chancellor to declare the trust, and to make a decree in favor of the beneficiaries. If the written evidence fails to supply any essential detail of the trust, parol evidence is incompetent to supply the deficiency. Where, therefore, the holder of the legal title to certain lands, who was the alleged trustee, wrote and signed two private letters to one of the alleged *cestuæ que trustent* in which, inter alia, he admitted the evidence of a trust but failed to set forth who were the *cestuæ que trustent*, in what proportion they were to take, or what was the exact nature of the trust, and an attempt was made to supply these deficiencies by parol testimony, *held*, that such testimony was inadmissible; that assuming (but not deciding) that these letters, had they been sufficiently specific, would have raised a trust under the act of 1856, yet as they failed to set forth certain essential details of the trust they were insufficient to establish the trust under the act of April 22, 1856."

To the same effect is Martin vs. Baird, 175 Pa., 540, in which case the court below laid stress upon the facts that "it was not signed by the party holding the title thereof."

Nor was this a resulting trust. "A resulting trust is raised only from fraud in obtaining title or from payment of the purchase money when the title is acquired": Nixon's Appeal, 63 Pa., 279; Barnett vs. Dougherty, *supra*. There is no allegation of fraud in obtaining title to the land, and plaintiff admits in his bill that the title was placed by consent in defendant's name; and there is no allegation that plaintiff paid any part of the purchase money. That part of their father's estate was used by defendant might make him liable to the estate, but is no evidence of payment by plaintiff. "In a transaction claimed to create a resulting trust, if there is nothing more than is implied from the violation a parol agreement equity will not decree the purchaser a trustee. A mere declaration of one that he purchased for another, without any previous agreement or without any advance of money, raises no trust which equity will support": Willard vs. Willard, 55 Pa., 119.

If, however, this should be considered a resulting trust, it is barred by the sixth section of the act of April 22, 1856, according to the opinion of Paxson, J., in Christy vs. Sill, 95 Pa., 380.

As the bill does not set forth sufficient in law or equity to raise an express trust manifested in writing signed by defendant, or by im-

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plication or construction of law, and as a resulting or implied trust would be barred or extinguished by lapse of time and the laches of plaintiff, we are of the opinion that the first, second, third and fifth grounds of demurrer must be sustained.

And now, January 8, 1901, it is ordered, adjudged and decreed that the demurrer to the plaintiff's bill be sustained, and the bill be dismissed with costs.

Orphans' Court of Montgomery County.

Estate of William L. McDowell.

Legatees may demand a division of the testator's securities in specie unless such division is injurious to the estate or prejudicial to other interests. Executors can not withhold such distribution of stocks because they may fear the legatees will not agree with the executors—who are also legatees—in the management of the corporation which issued the stocks.

Rule for an order on executors directing them to divide certain securities among legatees.

H. M. Brownback, Esq., for executors.

Edmund G. Hamersly, Esq., for legatees.

Opinion of the court by Swartz, P. J., November 23, 1900.

William L. McDowell died testate on the 24th day of February, 1897. He gave to his wife all his "household goods, horses, carriages, and farming utensils."

As to the residue of his property the will provides and directs as follows: "I will and direct that all the rest of my estate, real and personal, shall remain as it now is or be sold and the proceeds reinvested as may be directed by my executors; and that my wife Mary shall have the whole income derived from said estate, with the privilege to her, nevertheless, if the income should be more than her needs, to divide the same with any of my children, charging the same to their account; or should there be sufficient estate to warrant it, she may at any time anticipate the final division by paying over to any of my children a portion of their proportion not to ex-

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ceed one-half of their supposed share; and at her death the whole estate shall be divided between my said children, share and share alike, charging to each one who may have received any portion before this final division with such money or property as they may have received from my estate after my decease."

The widow of the testator died February 18, 1899. In April, 1899, the executors filed an account showing a balance of one hundred and seventy-five thousand dollars. The greater portion of this balance consisted of unconverted securities. The cash, aggregating over fifty thousand dollars, was distributed among the children. A second account was filed, showing a balance of more than four thousand dollars. This was also divided among the legatees.

The executors now have in hand the following stocks or securities: 463 shares of the capital stock of the Leibrandt & McDowell Stove Company, 3,175 shares of the capital stock of the West Buck Mountain Coal and Iron Company, 60 shares of the Blockley and Merion Turnpike Company, and certain personal property on the Paoli farm.

The testator left seven children, four of whom are now asking for a division of these unconverted securities. This application is resisted by the executors, who are two of the sons of the testator. They are also the President and Vice President of the Leibrandt & McDowell Stove Company. The objections to a division of the stocks, as given by them, are as follows: That it is for the best interest of all concerned that the stocks should remain intact until a purchaser can be secured for the same; that the executors need the income of these stocks to meet the expenses of the non-productive real estate now owned by all the children in common as legatees under the father's will; that under the Federal law a war tax may be imposed upon the estate, and the executors will not be in funds to meet this tax if the stocks are distributed; that the stove company is now well managed, with prospects of large profits; that the petitioners seek a division of the stocks with the purpose of interfering with the present management of the stove company.

The testator died more than three years ago. His widow is dead for more than a year and a half. Upon the death of the wife the testator directed that the whole of his estate should be divided among his children. The executors are not made trustees for their brothers and sisters; they are not made the custodians of these stocks

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after the death of the mother. They have not sold them; no doubt they acted wisely. If it be true that it is for the best interest of all that they should not be sold at this time, it follows that the only thing that can be done and should be done is to divide them in kind among the children. The children should be compelled to take the stocks and not force the executors to sell to raise cash, if such sale would affect the stove company injuriously.

That the executors may need the income from these stocks to pay taxes and repairs on the real estate is no valid objection to a distribution. We must assume that all the children are interested in protecting the real estate, and will contribute their share of the expenses as freely as the necessity may demand.

There is nothing before us from which we may find that the petitioners are actuated by improper motives in demanding a distribution. They are equally interested with the two sons who are the executors. If they are equally interested in the stocks, by what right do the two children arrogate to themselves the full control over all the stocks?

Under the will the executors have the right to sell the stocks for the purpose of distribution if in their judgment such sale is for the best interest of the estate. Their judgment does not approve a sale at this time. If it were otherwise, and they deemed a sale advisable, still the legatees may step in and demand a division of the securities in specie unless such division would produce a loss to the estate or prejudice the interest of others: Reed's Estate, 82 Pa., 428; Brown's Appeal, 12 Central, 684. As already shown, the wrong or injury arises from the failure to divide the securities. No loss to the estate or prejudice to other rights is established. The executors do not require the stocks to meet debts. They filed two accounts, and two distributions to legatees were made. The testator is dead for nearly four years; and if the securities are divided by order of the court, the decree of distribution will be a further protection to the executors.

In making the rule absolute provision must be made by the legatees for any Federal taxes which may become payable out of the estate. This matter, no doubt, can be amicably arranged; if not, the court will endeavor to frame a decree to meet the contingency.

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Platt's Estate.

And now, November 23, 1900, the rule is made absolute, and a decree for a division of the stocks will be prepared and presented by counsel.

Estate of Elizabeth S. Platt, Dec'd.

A testatrix in her will pr vided as follows: "All which I now hold, and that which I inherit not yet delivered to me, I give my three children, all share and share alike. To protect my daughter's portion safe from the risks of business I leave it in trust to Samuel Sellers, my brother, . . . to hold subject to her exclusive control under the trust." *Held*, to vest an absolute estate in the legatee, discharged of the trust.

Petition for an order on executor to pay over legacy.

Louis M. Childs, Esq., for petitioner.

Charles H. Eimerman, Esq., contra.

Opinion of the court by Weand, J., November 23, 1600.

By the will of testatrix it is provided, *inter alia:* "I herewith make a final disposal of my property of all kinds, personal and otherwise, to my three children share and share alike, with the loving request that it be most sacredly observed by all. All which I now hold, and that which I inherit, not yet delivered to me, I give my three children, all share and share alike. To protect my daughter's portion safe from the risks of business I leave it in trust to Samuel Sellers, my brother; and if he should not be living, to Edward Sellers, another brother, to hold subject to her exclusive control under the trust." Both parties named as trustees have declined to accept the trust. The petitioner, a daughter of testatrix, now asks for an order on the executor to pay to her her full share of the estate, as appears by the account filed. The executor declines so to do, upon the ground that an active trust is created by the will.

The only words that could be construed in favor of an active or special trust are "to protect my daughter's portion from the risks of business." It is not stated how this is to be accomplished. There is no provision for the payment of income nor a disposition after the daughter's death. An absolute estate is first given; then the portion is left in trust "to hold subject to her exclusive control under the trust." It would be difficult to define the duties of a trustee under this will, for if the legatee is to have exclusive control it would

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be inconsistent with any right of the trustee to control the investment. No doubt the testatrix intended some form of protection for her daughter, but has failed to properly do so. Here the only restriction is against the risks of business, without any restriction against exclusive control of the fund. We think an opinion in Yocum vs. Wright, 11 Montg., 99, rules this case, and we refer to it as applicable to the present contention.

And now, November 23, 1900, it is ordered and decreed that Edward Sellers, executor of Elizabeth S. Platt, pay unto Isador P. Brown, legatee under the will of said testatrix, the share bequeathed to her under said will, as appears by the settlement of the account in said estate.

Court of Common Pleas of Montgomery County.

JAMES M. MORRISON VS. BURGESS AND COUNCIL OF THE BOROUGH OF CONSHOHOCKEN.

Under the act of March 22, 1870, P. L. 522, relating to streets in the borough of Conshohocken, a street is not opened until the possession of the land-owner is disturbed or some act is done appropriating the land of the owner.

Where the opening and grading of a street constitute one and the same act, damages for change of grade may not be assessed under the act of May 24, 1878, P. L. 129, although the delay in the actual work done may extend through some years.

EXCEPTIONS to report of viewers assessing damages. No. 47, October T., 1899.

Evans, Holland & Dettra, Esqs., for plaintiff.

William B. Meyers, Esq., for defendant.

Opinion of the court by SWARTZ, P. J., January 15, 1900.

Spring Mill avenue was laid out by commissioners named in the act of the Legislature incorporating the borough of Conshohocken, passed May 15, 1850, P. L. 1051. By a supplement to this act, passed March 22, 1870, P. L. 522, it was provided: "That so much of the act of Assembly incorporating the said borough of Conshohocken, approved the 15th day of May, 1850, as declares that the streets, lanes and alleys laid out by the commissioners

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named in said act shall from thenceforth be opened for public use, in the same manner as if they had been laid out by order of the court in the usual way, be and the same is hereby declared to intend and mean that from the time of the filing of the said report and plan or draft of the streets, lanes and alleys in said borough of Conshohocken by the commissioners aforesaid and the acceptance and confirmation of the same by the Court of Quarter Sessions of the county of Montgomery, thenceforth all the said streets, roads, lanes and alleys so approved by said court shall be forever deemed, adjudged and taken to be public highways; and the survey so returned and recorded shall be and remain unalterable, except by the action of said court according to law; and inasmuch as the public convenience will for the present be answered by the certain knowledge where and in what manner such streets, roads, lanes and alleys will in the future be made, but as it may not be necessary immediately, or for some years hence, to lay all of them open for public use and travel, and in order to provide for the opening and completing the same from time to time, as increasing improvements of said borough may require, it shall and may be lawful for any number of citizens of the said borough, not less than ten, whose lands or improvements lie near or adjoining to such street, road, lane or alley, to apply by petition to the Court of Quarter Sessions of the county of Montgomery, who, after hearing the petitioners and such of the persons through whose lands such street, road, lane or alley may pass, and any other person or persons interested, or the said burgess and town council, as shall offer objections thereto, shall determine whether it be proper at the time to direct the opening of the same; and if the court shall be of opinion that the state of improvements in the neighborhood of such street, road, lane or alley is such as to require the opening thereof, they shall issue their order directed to the said burgess and town council of said borough, enjoining them to open such street, road, lane or alley according to the plan or draft of the survey of said borough; and thereupon the said burgess and town council shall, if at that time they have not already done so, immediately fix the grade of such street, road, lane or alley by and according to which the same shall be opened; and the person or persons, company or corporation, who shall sustain any damages by laying out and opening any such street, road, lane or alley, shall be entitled to recover the same in the same manner as if such street, road, lane

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or alley had been originally laid out by order of the Court of Quarter Sessions of said county, under the general road laws of the commonwealth."

Proceedings to open Spring Mill avenue were had under this act of 1870 just cited. The opening order issued to the borough authorities from this court on May 5, 1881. Shortly after the opening order was received the borough fixed the grade of the street as provided by the act of 1870, and in 1881 opened and graded the south half of the street. The south half was cut down according to the grade established in 1881. The street as laid out was eighty feet wide: and by opening and grading the one-half width thereof, that part of the street was open to public travel.

The plaintiff's house and lot fronted on the north half of the street. The opening of the south half did not in any way disturb the plaintiff's property. The natural grade of his ground was not in any manner changed. The original surface grade remained, and showed rocks and boulders. This undisturbed surface remained until 1896, when the borough graded down the north half of the street so as to conform to the south half and to the grade established in 1881.

There is no evidence or allegation that the borough authorities did anything during the fifteen years, in pursuance of the opening order, whereby the possession of the plaintiff was disturbed. It does not appear that the borough did any act, gave any notice or made any demand affecting or relating to the possession or appropriation of the plaintiff's land, until 1896.

On July 1, 1899, the plaintiff applied for the appointment of a jury, under the act of May 24, 1878, P. L. 129, to assess his damages for a change of grade in front of his property. The change of grade for which damages are claimed consists of the cutting down the street in front of his property from its natural grade to a grade fixed by the borough before the street was opened, and this paper grade was established so that the street might be opened according to it.

The plaintiff, in our judgment, failed to adopt the proper proceeding to have his damages assessed.

The street was not opened until 1896, so far as the plaintiff's property is affected, and the cutting down of his ground was part of the opening act. It is only where the appropriation of the land

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for the opening and the grading are so far separated in time as to become distinct acts, that the damages for grading can be recovered by an independent proceeding: Rodgers vs. Phila., 181 Pa., 243.

Under the facts admitted in evidence, and the authorities collected in Second Avenue. 7 Pa. Superior Ct., 55, we think it is clear that Spring Mill avenue was not opened, as to the plaintiff's property, until 1896 The opening order was issued to the burgess and town council, but so far as the plaintiff's property was concerned it was allowed to slumber for fifteen years. It was not until 1896 that any act was done which disturbed the actual possession of the owner, and it was not until then that his right of action for damages accrued: Volkmar Street, 124 Pa., 320. That the street was opened as to other land-owners, at an earlier date, does not help the plaintiff's case. His right of action for damages accrues from the time his own lot is appropriated and actually thrown open: Lewistown Road, 8 Pa., 109. The burden rests upon him to show the acts of interference. If the street was not opened until 1896, then the actual appropriation of the land and the grading were done at one and the same time. The plaintiff's damages therefore arose from the opening of the street, and not from any change of grade independent of the opening.

The borough complied with the provisions of the supplement of March 22, 1870, by fixing the grade as soon as the order to open was directed to it, so that it might comply with the further requirement of the act, which directed "by and according to which (grade) the street shall be opened."

The authorities were not only to open the street according to the grade so established, "but all persons who shall sustain any damages by laying out and opening any such street, shall recover the same," . . . "under the general road laws of the commonwealth." The act clearly points out how the plaintiff shall recover his damages for the opening, according to the fixed grade, and this is the remedy he must follow. The seventh section of the act of 1836 requires the appointment of a jury to assess the damages, and where there is no repeal by subsequent legislation this remedy, under the general road law, must be followed because the act of 1870 so declares: In re Change of Grade of Ridge Avenue, 99 Pa., 469.

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Morrison vs. Burgess, &c., of Conshohocken.

The act of May 24, 1878, under which the petitioner proceeded, has no application where there is an opening or a laying out of a street; it only applies where a street already opened is changed in grade or is otherwise enlarged: Seaman vs. Borough of Washington, 172 Pa., 467.

The petitioner relies on Hendricks' Appeal, 103 Pa., 358; but in that case the damages did not arise from the opening of the street. The street had been opened for years, and after the public had used it as a highway the borough authorities changed the grade of the existing street. The question decided was that a change of grade from the original surface grade was nevertheless a change of grade. Counsel contends that Spring Mill avenue was opened to public travel just as much so as Haws avenue, the street under consideration in Hendricks' Appeal. The facts do not sustain this contention. Mrs. Hendricks' land was actually taken for public use long before the borough of Norristown fixed a grade and altered the street. The plaintiff's land was not taken for street purposes until 1896. The street over her land was then opened according to a grade which the borough established long before his ground was touched. True, Spring Mill avenue was open in part before 1896; but his possession was undisturbed. He continued to hold the exclusive use and possession of his land just as much so as if the commissioners had laid out the street forty feet wide along the line of his property instead of eighty. Counsel for the borough contends that the damages of the petitioner when assessed must be paid by the county. This question is not now before us. The plaintiff claims damages for cutting down his ground so that his house sets eighteen or twenty feet above the street grade. He makes no claim in his present application for damages for land taken, and it may well be that the borough should pay the injury arising from cutting down the street according to a grade established by it. The cutting down of plaintiff's ground is in effect a municipal improvement; and under the constitution, municipal corporations are required to make just compensation for property injured or destroyed by the construction or enlargement of their highways.

The act of March 22, 1870, points out the method whereby the damages are to be recovered; but it does not necessarily follow that a damage resulting altogether from a municipal improvement, shall e paid by the county. The county had no voice in establishing

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the grade; and if the borough can impose the damages on the county it would seem like an undue hardship. If the county becomes the paymaster for borough improvements, the temptation toward extravagance on the part of the borough might become so great as to menace the county treasury. The act of March 22, 1870, may mean no more than to point out the method and machinery whereby the damages are to be ascertained: In re Airy Street, 113 Pa., 281. But, as already stated, this question is not before us, and we do not mean to decide it.

And now, January 15, 1900, the exceptions, so far as they relate to the question of jurisdiction in the Common Pleas, are sustained, and the report of the jury is set aside.

IN EQUITY.

JAMES W. SHEPP AND DANIEL B. SHEPP VS. THE SCHUYLKILL VALLEY TRACTION COMPANY, THE UNITED POWER AND TRANSPORTATION COMPANY, JOHN A. RIGG, R. N. CARSON, E. J. MOORE, H. C. MOORE, N. H. LARZELERE, J. T. DYER AND M. C. AUCHENBACH.

The purchase of stock in a Pennsylvania corporation and the voting of it for directors by a foreign corporation, is not "doing business" in this commonwealth, within the meaning of the act of April 22, 1874, requiring a statement to be filed with the Secretary of the Commonwealth.

The ownership by one corporation of the stock of another corporation, and the election of directors by virtue of the ownership of such stock—the corporate existence being maintained—only gives the first named corporation the rights and powers of a stockholder in the latter; and it is not the corporation, in the sense of that term, as applied to the management of the corporate business or the control of the corporate property.

No. 11, June T., 1900.

Cyrus Derr and *William B. Solly, Esqs.*, for plaintiffs.

John G. Johnson and *N. H. Larzelore, Esqs.*, for defendants.

Opinion of the court by WEAND, J., February 4, 1901.

HISTORY OF THE CASE.

The Schuylkill Valley Traction Company is a corporation organized under the act of Assembly entitled "An act to provide for the incorporation and regulation of motor power companies for

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operating passenger railways by cables, electrical or other means," approved March 22, 1887, P. L. 8; and the plaintiffs are shareholders therein. The said company has leases for five street railways in Montgomery county, Pennsylvania. The United Power and Transportation Company, one of the defendants, is a New Jersey corporation, and the other defendants are directors and officers of the first named corporation.

The New Jersey corporation, defendant, on or about February 1, 1900, acquired by purchase 7,984 shares of the capital stock of the Schuylkill Valley Traction Company; and thereafter, by virtue of the ownership of said shares, was able and did, at a meeting of the stockholders of said traction company, control the election of a board of directors.

The bill complains that the United Power and Transportation Company procured the directors to vote salaries to the President and Vice President of the traction company, in order to appropriate to its own use all the net earnings of said traction company; that it has also issued trust certificates, made loans, pledged the stock of the traction company, and obtained absolute control of said company, etc.; that said United Power and Transportation Company is doing business in the state of Pennsylvania without having filed with the Secretary of the Commonwealth the statements required by the second section of the act of Assembly, entitled "An act to prohibit foreign corporations from doing business in Pennsylvania without having known places of business and authorized agents," approved April 22, 1874, P. L. 108.

The prayer of the bill is that a decree be made that the said United Power and Transportation Company is without authority of law to acquire and hold control of the said Schuylkill Valley Traction Company, and is without authority of law to keep possession of and operate the railways and property of said traction company and other relief to the same effect.

The answer of defendants denies all the material averments in plaintiffs' bill alleging illegal acts, but admits the ownership of stock in the Schuylkill Valley Traction Company and the election of its directors.

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FINDINGS OF FACT.

1. The Schuylkill Valley Traction Company is a corporation organized under the act of March 12, 1887, having a capital stock of $500,000 divided into ten thousand shares of the par value of fifty dollars each; and the plaintiffs, James W. Shepp and Daniel B. Shepp, are each the owners of 996 shares of said stock.

2. That said traction company on or before February 10, 1900, was, under leases for long term of years, in possession of five street railways in Montgomery county, Pennsylvania, together with a power-house, car-barn, cars, etc.

3. The United Power and Transportation Company, defendant, is a corporation erected and existing under the laws of the state of New Jersey.

4. Amongst the powers granted said corporation are enumerated, *inter alia:*

> To produce and furnish power by any means.
>
> To obtain, accept and use all permits and franchises, municipal or otherwise.
>
> To carry on the business of buying, selling, leasing, constructing, connecting, maintaining and operating street railways and railways between cities, towns and villages, or cause the same to be done, and make and perform contracts for any of said purposes.
>
> To purchase, hold, pledge, sell or dispose of the plants, appurtenances, securities and stocks of any street railway, electric light, heat, power or other corporation, and to exercise the rights of stockholders as to such stock.
>
> To acquire, hold, sell, pledge or otherwise dispose of the shares of capital stock or securities, rights and assets of other corporations, and operate such properties, and to exercise all the privileges of ownership, including the right to vote to the same extent as natural persons.

5. The said United Power and Transportation Company acquired by purchase from the owners thereof 7,984 shares of stock of the said Schuylkill Valley Traction Company.

6. The directors of the traction company are John A. Rigg, R. N. Carson, E. J. Moore, H. C. Moore, N. H. Larzelere, John T.

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Dyer and D. B. Shepp. Of these directors the following are also directors of the United Power and Transportation Company: John A. Rigg, R. N. Carson, E. J. Moore and H. C. Moore.

7. The United Power and Transportation Company, by virtue of its ownership of said stock in said traction company, exercised its rights of ownership by voting for directors of said company.

8. The Board of Directors of said traction company by resolution of its Board of Directors, duly passed, voted to its President, said John A. Rigg, a salary of $2,400 per annum, and to its Vice President a salary of $1,200 per annum; but there is no evidence that said amounts are unreasonable.

9. Said John A. Rigg is also President of the United Power and Transportation Company; but no part of his salary as President of the traction company, or that of its Vice President, goes into the treasury of the United Power and Transportation Company.

10. It is not true that the Board of Directors of the traction company authorized its President to "borrow money whenever the company should reqnire funds in addition to its regular and ordinary receipts." Said resolution merely authorized the President of the company to borrow such sums of money to meet current and ordinary expenses from time to time, as should be necessary; and at that time there were damage claims unsettled, with no funds in the treasury sufficient to pay the same.

11. The books of the traction company are not in the possession of the power company, but are kept in the office of the traction company at Norristown, except when for convenience for certain purposes they have been temporarily taken to Philadelphia or Reading.

12. We can find no evidence that the United Power and Transportation Company, or the Board of Directors of the traction company, have done any act or thing to the prejudice of the rights of the stockholders of the traction company, as a matter of fact.

13. The United Power and Transportation Company has not filed in the office of the Secretary of the Commonwealth of Pennsylvania the statement, nor has it complied with the second section of the act of Assembly approved April 22, 1874.

14. There is no evidence that the United Power and Transportation Company is doing any business in the state of Pennsylvania other than by the purchase of the stock of motor or traction railway, electric light, heat and power companies. The question as

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to whether such ownership is "doing business" within the meaning of the law, will be discussed as a matter of law.

15. The power company has its general or principal office in Camden, New Jersey, with a branch office in Philadelphia.

ARGUMENT IN SUPPORT OF CONCLUSIONS OF LAW AND DECREE.

The question raised by the pleadings and testimony and our findings of fact resolves itself into one of law, viz.:

Is the purchase of the stock of a Pennsylvania corporation, and the voting of it in this state by a foreign corporation, "doing business" in this commonwealth within the meaning of the act of April 22, 1874, which requires a statement to be filed with the Secretary of the Commonwealth?

The plaintiffs' contention is that whilst the purchase and voting is the only act done, yet when it results in the election of a board of directors of a Pennsylvania corporation, composed to some extent of persons who are also directors of the foreign corporation, and of others who are naturally influenced in favor of said foreign corporation by reason of receiving its votes, it amounts to an exercise of control and authority by the foreign corporation, and is therefore the doing of business forbidden by the act.

It can scarcely be contended that a citizen of this state who owns stock in a railroad of New Jersey is therefore doing business in the latter state. The voting power is an incident of ownership, for without it an owner might not be able to take any part in the internal management of the company. In this case, if the power company by its charter is empowered to invest its money in Pennsylvania stock, as it has done, if the contention of plaintiffs is correct, although owning 7,984 shares out of 10,000, it would have no voice in the management. That such right to vote has been recognized in the case of foreign holders of our local stocks is familiar to every capitalist or business man; and we know of no law which forbids the ownership of local stocks by residents or corporations of other states.

As the act of voting the stock is but an incident of ownership, the "doing of business" must follow from the fact of ownership. In Building, Loan and Savings Association vs. Berlin, 15 Pa. Super. Ct., 393, it was said. The words "doing business," as used in the

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act of 1874, have been before the courts of the state for interpretation a number of times. It would involve an undue extension of this opinion to review the cases separately. From an examination of them it will appear that the following considerations, *inter alia*, moves the court in reaching a decision: 1. That the corporation had or had not a part of its capital invested or employed in the state of Pennsylvania: Meashon & Co. vs. Lumber Co., 187 Pa., 12; Blakeslee Manufacturing Co. vs. Hilton, 5 Pa. Super. Ct., 184; Kilgore vs. Smith, 122 Pa., 48; 3. That the company had offices and agents for the general conduct of its business within the state: Blakeslee Manufacturing Co. vs. Hilton, *supra;* Wolff Dryer Co. vs. Bigler, 192 Pa., 466.

If the expression that "the corporation had or had not a part of its capital invested or employed within the state of Pennsylvania" is to be taken literally, then the power company certainly falls within the prohibitive terms of the act. But we do not so read the law. The meaning, we think, is that such capital should be invested in business and not merely in the ownership of securities or other investments; and thus read, all the cited cases can be reconciled.

In discussing the question we must not overlook the fact that "the shares in a corporation constitute a species of property entirely distinct from the corporate property. A share-holder has no distinct and individual title to the moneys or property of the corporation, nor any actual control over it; the shares represent a right to participate in profits only": Bidwell vs. Pittsburg, Oakland and East Liberty Passenger Railway Co., 114 Pa., 535. In Commonwealth vs. Standard Oil Co., 101 Pa., 119, it was held that the ownership of shares of stock in Pennsylvania corporations, and of the interests in Pennsylvania limited partnerships doing business as aforesaid, and the purchases of oil as aforesaid, did not constitute a "doing of business" in this commonwealth so as to subject the Standard Oil Company (a foreign corporation) to taxation under the acts of May 1, 1868, Sec. 4, April 24, 1874, Sec. 5, March 20, 1877, Sec. 3, and June 7, 1879, Sec. 4, requiring foreign corporations, *inter alia*, "doing business in this commonwealth" to pay a certain tax upon their "capital stock."

The importance and bearing of this ruling will be seen when we consider that one of the objects of the act of Assembly (April 22, 1874) was to bring corporations employing their capital in this

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state, and doing business here, within the taxing power of the commonwealth: Kilgore vs. Smith, 122 Pa, 48; Meashon & Co. vs. Lumber Co., 187 Pa., 12. The question of what was to be taxed was the subject of inquiry. The stock of local corporations owned by a foreign corporation was claimed to be taxable; and the question for decision was, Is the ownership of such stock a "doing of business"? and it was decided in the negative. It was claimed to be an act done in a certain way, just as here it is contended that the investment of capital is doing business. In this case the investment is authorized by the charter, and is not forbidden by the laws of our state; and is therefore in itself not unlawful. With the results which may follow from the thus obtaining control of our corporations we have nothing to do in this proceeding. If it shall work harm to the public, the remedy is with the Legislature. The stock of the power company is not taxable in this state, and our own corporations are subject to the laws governing the same as supervised by the Treasury and Auditor General's departments.

In the bill it is claimed that the New Jersey company has assumed control and authority over the traction company, and in effect is managing and running it as owner. This is denied as a fact in the answer and testimony. Does the ownership of the stock and the election of directors have that effect? This question is answered in the case of Pullman Car Co. vs. Missouri Pacific Co., 115 U. S., 587, in an opinion by Chief Justice Waite. The question was as to the control of the St. Louis, Iron Mountain and Southern Company, all or nearly all of whose stock was owned by the Missouri Pacific Company. The court said: "Confessedly the St. Louis, Iron Mountain and Southern Company keeps up its own corporate organization. It operates its own road. It has its own officers and makes its own bargains. The Missouri Pacific owns all, or nearly all, its stock, and in that way can determine who shall constitute its board of directors; but there the power of that company over the management stops. The board when elected has controlling authority, and for its doings is not necessarily answerable to the Missouri Pacific Company. The two roads are substantially owned by the same persons and operated in the same interest; but that of the St. Louis, Iron Mountain and Southern Company is in no legal sense controlled by the Missouri Pacific. It is true the bill avers in many places and in many ways that the purchase of the stock of the St. Louis, Iron Mountain and

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Southern Company was made by the Missouri Pacific Company for the purpose and with the intent of getting the control of the road of the St. Louis, Iron Mountain and Southern, and that the case is before us on demurrer to the bill. A demurrer admits all facts stated in the bill which are well pleaded, but not necessarily all statements of conclusions of law. What was done is stated clearly and distinctly. The effect of what was done is a question of law, not of fact. It is a matter of no importance what the purpose of the parties was if what they did was not sufficient in law to accomplish what they wanted. When there is doubt, the purpose and intention of the parties may sometimes aid in explaining what was done; but here there is no need of explanation. The Missouri Pacific Company has bought the stock of the St. Louis, Iron Mountain and Southern Company, and has effected a satisfactory election of directors; but that is all. It has all the advantages of a control of the road; but that is not in law the control itself. Practically it may control the company, but the company alone controls its road. In a sense the stockholders of a corporation own its property; but they are not the managers of its business or in the immediate control of its affairs. Ordinarily they elect the governing body of the corporation, and that body controls the company. Such is the case here. The Missouri Pacific Company owns enough of the stock of the St. Louis, Iron Mountain and Southern to control the election of directors, and this it has done. The directors now control the road through their own agents and executive officers, and these agents and officers are in no way under the direction of the Missouri Pacific Company. If they or the directors act contrary to the wishes of the Missouri Pacific Company, that company has no power to prevent it except by the election, at the proper time and in the proper way, of other directors, or by some judicial proceedings for the protection of its interest as a stockholder. Its rights and its powers are those of a stockholder only. It is not the corporation, in the sense of that term as applied to the management of the corporate business or the control of the corporate property."

We have cited liberally from the above case because of its high authority, the identity of facts with the case we are discussing, and because it seems to be a complete answer to plaintiffs' proposition that the power company, by reason of its ownership of stock and election of directors of the traction company, has thereby assumed

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possession and control of its management. What the Missouri Pacific Company has done in its case, the power company has done in this case; and the reasoning in the one case applies equally as well to the other.

In Kilgore vs. Smith, 122 Pa., 48, it was said that "it has never been held that a citizen of Pennsylvania may not be a member of or stockholder in a corporation of another state." In Com. ex rel. vs. Detweiler et al., 131 Pa., 614, it was also said that a non-resident or alien friend may be a stockholder in a Pennsylvania corporation, and that "he takes his shares with all the rights and privileges which pertain to them in the hands of a citizen; he may vote upon them, and where no other qualification than the ownership of shares is required of directors he may lawfully become a director in such an association."

It is earnestly argued that the public policy of the commonwealth of Pennsylvania, as deduced from the provisions of Sec. 5 of Article XVII of the Constitution of our state, prohibits the acts here complained of, providing, as it does, that "no incorporated company doing the business of a common carrier . . . shall directly or indirectly engage in any other business than that of common carriers." This proposition, however, assumes two facts which plaintiffs have failed to establish, viz.: that the United Power and Transportation Company is a common carrier in this state, or that it is engaged in other business than that of common carriers or engaged in any business within the meaning of the constitutional provision.

If the views we have already expressed as to the relationship between the defendant company and the traction or electric light companies are correct, the argument of plaintiffs' counsel is based upon a false premise.

The argument based upon the possible injury to certain corporations by the absorption of their stock by other corporations or even by syndicates or trusts, is one with which we are unable to deal in this controversy. Economic questions of this character will always be met by legislative enactment or by the laws of finance and trade when the conditions of affairs becomes such as make the evils apprehended real and apparent.

In this case we are only dealing with an alleged infringement of plaintiffs' rights, and not with a general evil which may result to others or under other circumstances. If the defendant company shall

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in other ways violate the laws of Pennsylvania, there is abundant authority in the law, acting through the courts or the Attorney General, to restrain them by *quo warranto* or other legal remedies; and the same is true of the traction company if its directors, no matter by whom elected, should violate their duties to the prejudice of the share-holders.

We can find no act, deed or thing done by either of the defendants for which the plaintiffs have a right to complain, and therefore arrive at the following conclusions:

1. That the United Power and Transportation Company is not, because of any thing complained of in this bill, doing a business in Pennsylvania which requires it to file the statement required by the second section of the act of April 22, 1874, P. L. 108.

2. That neither of the defendants are guilty of any unlawful act complained of in this bill.

3. That the plaintiffs have not made out a case which entitles them to the relief prayed for.

4. That plaintiffs' bill must be dismissed with costs.

And now, February 4, 1901, it is ordered and decreed that the Prothonotary enter a decree *nisi* dismissing the bill of plaintiffs at their cost; and unless exceptions are filed, as provided by the equity rules, he will enter a final decree as of course.

IN EQUITY.

URSINUS COLLEGE VS. THE BOROUGH OF COLLEGEVILLE AND FREDERICK PRIZER, TAX COLLECTOR.

Taxation—Buildings owned by incorporated college and used for the conduct and operation of the institution—Pres dent's house separated from main buildings by a public highway.

Buildings owned by an incorporated college and used by the instructors and officers are a part of the college proper, although one or more of the buildings may be separated by a public street.

The college buildings of an institution maintained by gifts, endowments and voluntary contributions, are exempt from taxation when students of any religious denomination are admitted and the tuition is in whole or part furnished gratuitously.

The President's house owned by the college and used by the chief officer of the Faculty while serving the institution, is a part of the college plant and exempt from taxation, although separated from the original college tract by a public street.

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Ursinus College vs. Borough of Collegeville et al.

FINDINGS of fact and conclusions of law upon final hearing before the court. No. 4, March T., 1900.

N. H. Larzelere, Esq., for plaintiff.

George W. Zimmerman, Esq., for defendants.

Opinion of the court by SWARTZ, P. J., March 29, 1901.

Under the bill, answer and proofs, the question is raised whether the house and lot owned by the college and occupied by the President of the Faculty, is subject to taxation for county, borough and school purposes.

FINDINGS OF FACT.

1. Ursinus College was incorporated by an act of the General Assembly, approved February 5, 1869, P. L. 107, as an institution of learning, for the purpose of imparting instruction in science, literature, the liberal arts and learned professions. Under this act, the Board of Directors was given authority to take, hold and purchase lands and tenements for the benefit of the college, as, also, moneys and effects of any kind, whether derived by gift, grant, bargain, devise, bequest, or otherwise. The Board was given power to erect buildings for its professors and officers.

2. The Directors, under the authority vested in them, purchased a tract of twenty-eight acres, upon which the main buildings and halls used by students and instructors are erected. There was no building upon the main tract suitable for the occupancy of the President of the Faculty. Dr. Bomberger, who held this office, purchased a lot adjoining the college grounds and fronting thereon. This building lot was separated from the college campus by a public highway. The Board of Directors agreed that if Dr. Bomberger would build for himself a house upon this lot for his use while in the office of President, the Board would take the property off his hands at an equitable adjustment. Upon the death of Dr. Bomberger, the college purchased the house and lot as a home or residence for its future presidents. The house was paid for by donations and gifts to the college. In 1899, and for some years prior, the house was occupied by Dr. Spangler, who still lives therein, and has held the office of President of the Faculty for about eight years. The house is near the main buildings of the college, and is well located as a home for the chief officer of the institution. Dr.

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Spangler pays no rent, but has the use of the house as part salary for his services as President. This building is just as needful to the college as any of the improvements on the twenty-eight acre tract.

3. Any student of good character may be admitted to the college. A course of religious study is followed in each department of the institution, but no distinction is made in the admission of students on account of their religious belief. Each student is left free to adopt any denominational belief.

4. A tuition fee of sixty dollars per annum is charged against each student who is able to pay, and, also, an incidental expense of twenty dollars per year. This charge is far below the actual cost incurred by the college in providing instruction. There are at all times a number of students who received their tuition gratuitously, or pay only in part. Last year, of the two hundred and one students, seventy-seven received aid from the college in their tuition, either in full or in part. If all had paid, the receipts would have been $12,000; but, in fact, the cash received was but $3,700.

5. The college is maintained by donations, gifts, endowments, bequests, and the tuition of the students. Last year the cost of maintaining the college was $32,749. Toward this expenditure the students contributed in cash for tuition but $3,700. The balance, less a deficit of $2,000, was made up from voluntary gifts, the income from endowment funds, and a small sum collected from the students as incidental expenses.

6. The allegation that free tuition is extended only to students who promise to enter the ministry of the Reformed Church, is not sustained, nor is there any evidence to sustain the allegation that free tuition is extended only to a certain class of students; all who are needy or indigent receive the aid.

7. The allegations that the college is supported in part from rentals of Bomberger Hall, or from proceeds of lectures and musical recitals, or from the sale of vegetables raised on the farm, are not sustained. No part of the twenty-eight acres is farmed. Some vegetables are raised and consumed in providing the students with board. The boarding of the students upon the college premises was found expedient to exercise a proper supervision over them.

8. During the months of July and August, in 1900, the college authorities conducted a summer boarding-house on the college premises. This continued only during the vacation period. In

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boarding the students, a net annual loss of about $1,600 was sustained. The profits of the summer boarding venture reduced the annual deficit to $800. There is no evidence that this vacation boarding feature existed when the taxes of 1899 were assessed and levied, and there is no proof that it will or will not continue in the future.

9. The assessor of the borough of Collegeville returned the house and lot, known as the President's house, for taxation. The assessment was made in April, 1899. No notice was given of the attempt to tax the property for borough and school purposes, except that the assessor met the Secretary of the Board of Directors on the highway and told him the property was assessed, without stating the valuation, or when and where an appeal from the assessment would be heard. The collector threatened to collect forty dollars tax by distraining the goods in the President's house.

10. All the buildings and improvements were erected with the donations, gifts and endowments of the friends of the college. The college is well equipped to furnish and does furnish a liberal education to young men and women and prepares them to enter the learned professions or some industrial, scientific or commercial career. It is only through the aid of the voluntary gifts that the college was sustained during its years of usefulness, and unless these gifts continue its doors must close.

CONCLUSIONS OF LAW.

1. The main college edifice, with its dormitories, Memorial Hall, and all other buildings used for the purpose of the institution, constitute the college. The President's house is a necessary part of the college; it is a part of the college plant—an integral part of the institution.

2. As the President's house is in the actual use of the chief officer of the college in the discharge of his duties connected with the institution, it is exempt from taxation under the act of May 14, 1874, P. L. 158, passed to carry out the constitutional provision of Section 1, Article 9.

3. The plaintiffs are entitled to an injunction, restraining the defendant borough, its tax collector or agents, from collecting any taxes for school or borough purposes, assessed against the President's house, fully described in the plaintiff's bill, so long as the

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same shall continue a part of the college and be used in connection with the operations of the institution.

ARGUMENT IN SUPPORT OF OUR FINDINGS AND CONCLUSIONS.

All the essential facts in this case are in entire harmony with that of Northampton County vs. Lafayette College, 128 Pa., 132. It follows that the same rule of law is applicable, and the property described in the bill is exempt from taxation. In the Lafayette College case the president's house was separated from the main tract by a public street, just as in the case now under consideration. Ursinus College, under its charter, had the authority to purchase or erect buildings for its professors or officers. If in its infancy the college was unable to secure all the needed buildings because it was without sufficient means, surely it must be allowed to expand when the means are provided and the needs become more urgent.

If the exemption applies only to the original plot purchased. then it is of little value to many of our most successful institutions, The college beginnings are usually small. True, the cases speak of the "buildings located within the enclosure"; but this enclosure is not necessarily a picket fence. The line enclosing the college plant is rather an imaginary boundary line which may cross a public highway without doing violence to itself or to the public street. It is not a question of the extent of the territory, but an inquiry whether the building is necessary for the conduct and operations of the college. If the college invests in real estate, and the property is used only for the purpose of bringing in revenue to conduct the work of the institution, such property is not exempt from taxation. What was said in the House of Refuge vs. Smith, 140 Pa., 395, applies with equal force to the controversy now before us. The boys' department was separated from that of the girls. A farm was purchased in Delaware county for the use of the boys. An effort was made to subject the farm to a tax. The court says: "The two departments, though separated by a county line and some miles of distance, will nevertheless constitute one whole under the same management and devoted to the same work, as truly as when enclosed within the same wall in the city. Together they will constitute the actual plant used in the reformatory work for which the House of Refuge was organized; and looked at from the property point of view, they are the House of Refuge."

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And now, March 29, 1901, it is ordered and adjudged that the Prothonotary enter a decree nisi, enjoining the defendants from collecting the taxes assessed in 1899 against the President's house, described in the plaintiff's bill; and unless exceptions are filed, as provided by the equity rules, he will enter a formal decree as of course, the costs to be paid by the defendants.

IN EQUITY.

THE WILLOW GROVE AND GERMANTOWN PLANK ROAD COMPANY VS. THE PHILADELPHIA, GLENSIDE AND WILLOW GROVE RAILWAY COMPANY.

A mere surmise or apprehension that a steam railroad will, under the color of its charter, build a street passenger railway, is not sufficient to invoke equity interference in the absence of proofs that the defendant has in fact such purpose in view and is about to carry it out.

No. 12, June T., 1900.

Louis M. Childs, Esq., for plaintiff.

William F. Solly, Esq., for defendant.

Opinion of the court by WEAND, J., December 27, 1900.

HISTORY OF THE CASE.

The plaintiff is a turnpike company incorporated under the act of Assembly of April 12, 1853, and its supplements of February 6, 1857, May 2, 1858, and February 18, 1863. Its road-bed is in Montgomery county. The defendant company is a railroad company chartered under the general railroad laws of this commonwealth to construct a railroad in Montgomery county. The complaint in the bill is that defendant company, under color of its charter, and in pretended execution of the power therein granted, is about to locate, construct and operate a street passenger railway through the townships of Cheltenham and Abington, in said county of Montgomery, and has located its route for the construction of its railway so as to cross plaintiff's road at several points by grade crossings; that defendant company has not obtained the consent of the proper local or municipal authorities of the townships of Cheltenham and Abing-

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ton for the construction of their said railroad through said townships; that the defendant has not paid or secured or offered to pay or secure to the said plaintiff company the damages to be occasioned to it by the construction and operation of said railway across said turnpike, etc.

The answer denies that the defendant company has approved of a location or adopted the route or any part thereof as set forth in plaintiff's bill; and also denies that it is about to locate, construct and operate a street passenger railway through the townships named

FINDINGS OF FACT.

1. The plaintiff has failed to sustain any of the material facts necessary to entitle it to the relief prayed for.

2. Defendant company has not definitely located, staked out, or approved any route for its proposed road.

3. There is no evidence before us that any route has been selected.

4. There is no evidence that defendant, under color of its charter, is about to or intends to construct a street passenger railway.

5. There is a desire on the part of residents and property owners in the townships named for better facilities for reaching Philadelphia, and to accomplish this purpose a street railway or a steam railroad is contemplated. With this purpose in view interested persons have made preliminary or topographical surveys with a view of future action, and defendant company has been chartered; but no charter has yet been applied for or obtained for a street railway.

6. In order to determine the feasibility of constructing a street railway, options have been secured for a number of properties and agreements made looking to the construction of such road; but they were not made for the defendant company.

7. There is no evidence to show that the stakes already driven by the surveyors were fixed to finally determine or locate defendant's line of road; and we find that they were not driven in the interests of defendant's company to determine its route alone, but were staked by an engineer under the rights and privileges of the defendant's charter for the purpose of getting information to be used either in the construction of a steam road or a street railway.

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CONCLUSIONS OF LAW.

As plaintiff has failed to make out a case entitling it to an injunction, the bill must be dismissed.

The contention is founded on mere surmise and apprehension; but the testimony discloses that they were groundless, although to the plaintiff they appeared to be based on evidence furnished by rumors, surveys, and stakes planted.

In dismissing this bill we are not to be considered as adjudicating the rights of either party except as disclosed by this hearing; and if defendant does locate its road across plaintiff's highway contrary to law or in violation of defendant's chartered rights, this decree is not to prevent plaintiff from filing a new bill.

And now, December 27, 1900, unless exceptions are filed to this report within the time allowed by law or the equity rules, the Prothonotary will mark the bill dismissed with costs.

Court of Common Pleas of Berks County.

S. U. THOMAS VS. FOURTH STREET M. E. CHURCH.

An owner of two lots of land conveyed the two lots to A, subject to the lien of a mortgage created by the owner. A conveyed the two lots to B, subject to the payment of the mortgage; first, however, having secured the release of one of the lots from the lien of the mortgage. *Held*, that the assignee of the mortgage might, in an action of assumpsit in the name of A to the use of the assignee, recover from B the amount of the mortgage.

RULE for judgment for insufficient affidavit of defence.

Horace Roland, Esq., for plaintiff.

Baer, Snyder & Zieber and *George M. Ermentrout, Esqs.*, for defendant.

Opinion of the court by ENDLICH, J., October 8, 1900.

This is an action of assumpsit. The averments of the declaration, mentioned by the affidavit of defence, show the following state of facts:

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Thomas vs. Fourth Street Church.

On May 17, 1880, the Ebenezer Methodist Episcopal Church, a corporation, gave to Sallie E. L. Butz a mortgage for $3,900 upon two adjoining lots, one occupied by a church building and the other by a parsonage. By deed of March 25, 1892, the corporation conveyed these lots to S U. Thomas, subject to the lien of the mortgage. At Thomas's request, the mortgagee on October 18, 1892, released the church lot; thereafter, on November 14, 1892, Thomas, for the price of $5,100, conveyed both properties to defendant subject to the payment of a $3,900 mortgage in favor of Sallie E. L. Butz, the mortgagee above referred to, defendant accepting the conveyance and taking possession under it. On August 4, 1894, the committee of Sallie E. L. Butz assigned this mortgage to Frederick A. Roland, and $400 was paid on account of it. Interest is due since February 4, 1899.

It is to be observed at the outset that this is not an attempt on the part of a mortgagee to hold one deriving title to land from the mortgagor to a personal liability for the amount of the mortgage or an unpaid balance thereof, but in form and substance an action by the grantor of the defendant to recover out of the land an unpaid balance of the stipulated purchase price thereof, and that consequently the act of June 12, 1878, P. L. 205, has nothing to do with the case: Lennox vs. Brower, 160 Pa., 191, 193; Blood vs. Crew-Levick Co., 171 Pa., 328, 338. Thomas took the property from the Ebenezer M. E. Church, as the statement avers, subject to the lien of the Butz mortgage. The grant under seal imports a consideration (Cosgrove vs. Cummings, 195 Pa., 497); but the acceptance of it subject to the mortgage means that he paid just that much less than the stipulated consideration (Metzger vs. Gernert's Appeal, 71 Pa., 330, 332; Old Colony Trust Co. vs. Transit Co., 192 Pa., 596, 618). He therefore owed the amount of the mortgage as unpaid purchase money: Ibid.; Blood vs. Crew-Levick Co., 177 Pa., 606. The release of one of the lots from the lien of the mortgage did not of course extinguish any part of that liability, resting, as it did, not on the mortgage but upon the contract between him and his grantor; nor was the debt secured by the mortgage diminished by the release. The mortgage debt thus remaining unchanged in amount, and Thomas remaining liable for the whole of that amount, it was his manifest interest in conveying to defendant to shift on the latter,

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or upon the land in the latter's hands, the burden which he had assumed to discharge.

On this particular, among others, the present case is distinguishable from Moore's Appeal, 88 Pa., 450, and Samuel vs. Peyton, Ib., 465, relied upon by defendant, in which the ground for refusing to recognize a personal liability sought to be fixed on the grantees under similar grants was the want of interest on the part of the grantors to exact it, a circumstance which becomes insignificant only where the assumption of liability is in explicit terms: Merriman vs. Moore, 90 Pa., 78, 81. Ordinarily, the terms of every contract must be examined in the light of the circumstances under which it was made (Callen vs. Hilty, 14 Pa., 286, 288; Berridge vs. Glassey, 112 Pa., 442, 455), the subject-matter with which it deals (Machine Co. vs. Insurance Co., 173 Pa., 53, 57), the situation of the parties with reference to the same (Williamson vs. McClure, 37 Pa., 402, 408), and the reasonable object to be accomplished (Allison's Appeal, 77 Pa., 221, 226). Whatever, upon consideration of all these elements, including the language used, appears to be the intention and understanding present in the minds of the parties when the contract was made, will determine the effects to be given to it by the courts: Graver vs. Scott, 80 Pa., 88, 94.

In view of the situation of the defendant's grantor already pointed out; of the defendant, presumptively (and there is nothing to the contrary in the affidavit), under the grant subject to the mortgage, retaining the amount of the latter out of the stipulated consideration; and of the aptness of the terms of the grant to charge the payment thereof upon the entire property in defendants hands (Rohn vs. Odenwelder, 162 Pa., 346, 352; Brick Co.'s Assigned Estate, 183 Pa., 96, 99), it must be deemed to have been the intention of the parties, and therefore the effect of the language employed, to charge the whole of that property with the payment of the mortgage to the mortgagee. Nor is this conclusion forbidden by the denial in the affidavit of defence, of any agreement on defendant's part to hold the church lot subject to the lien of the mortgage. Doubtless to the extent of the release of October 8, 1892, that lien was and is extinct. But there is an important distinction between the lien of a mortgage and the mortgage itself, just as there is between the lien of a judgment and the judgment itself. See Stanton vs. White, 32 Pa., 358, 360. The denial of an agreement to renew

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the lien of the one or the other is not a denial of an agreement to pay it or to hold the land subject to the payment of it. The charge resulting from such a covenant is not in any proper sense the resurrection of a dead lien; it is a new liability, a new thing altogether, resting upon and springing from the covenant itself, and not upon or from the judgment or mortgage whose lien has been destroyed.

It can not be doubted that the charge to which the property in defendant's hands is subjected may be enforced by an action of assumpsit brought against defendant (DeHaven vs. Bartholomew, 57 Pa., 126; Rohn vs. Odenwelder, *supra*); by the grantor or in his name to the use of the person entitled to the money (Campbell vs. Shrum, 3 Watts, 60; Blood vs. Crew-Levick Co., 177 Pa., 606; Merriman vs. Moore, *supra*)—*i. e.*, in this case, the holder of the mortgage. And it may be added that, restricted as the judgment and its execution will be to the land itself, there seems to be no just gronnd of defence in this action. It has long since been recognized that "it is a maxim of common honesty, as well as of law, that a party can not have the price of land sold and the land itself": Maple vs. Kussart, 53 Pa., 348, 352. As already pointed out, presumptively and, for aught that appears in this case, certainly, the defendant, having the property, retains also an amount of the purchase price of it equal to plaintiff's demand. That sum is justly payable by the defendant to some one. It can make no difference to defendant to whom it is paid so long as it goes to the party to whom it properly belongs. In equity it originally belonged to Sallie E. L. Butz, the mortgagee. It now belongs to her assignee.

And now, October 8, 1900, the rule to show cause is made absolute, and judgment *de terris* is entered in favor of the plaintiff and against the defendant for $3,852.33.

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Court of Common Pleas of Montgomery County.

IN EQUITY.

THE BURGESS AND TOWN COUNCIL OF THE BOROUGH OF NORRISTOWN vs. THE PHILADELPHIA AND READING RAILWAY COMPANY AND THE STONY CREEK RAILROAD COMPANY.

A railroad company will be restrained by injunction from constructing a "Y" at grade across the public streets of a borough, when the only reason for so doing is to save the expense of improving a turn-table.

In this case the proposed leg of the "Y" would make three grade crossings of the same street within a distance of five hundred and fifty feet.

MOTION for preliminary injunction. No. 1, March T., 1901.

I. P. Knipe, Esq., for plaintiff.

James Boyd, Esq., for defendants.

Opinion of the court by SWARTZ, P. J., and WEAND, J., April 2, 1901.

The Stony Creek railroad extends from Norristown to the borough of Lansdale, where it connects with the North Pennsylvania railroad. At Norristown, by means of the Junction road, it connects with the Philadelphia, Germantown and Norristown railroad, thus forming a continuous line from Philadelphia to Lansdale. All the roads mentioned are operated by the Philadelphia and Reading Railway Company. For facility in turning their engines there is erected on the land of the Stony Creek Railroad Company a turn-table, which has been in continuous use for upwards of thirty years.

Markley street, in the borough of Norristown, was laid out by commissioners appointed by an act of the General Assembly in 1853, and was marked as such on the general borough plan. It was to be opened as the necessities of the case required. As laid out on the plan, it extends from Washington street northeasterly until it intersects and becomes part of Swede street; but is not opened its full length. By an order of court Markley street was directed to be opened for public use from Airy street to Swede street. The borough authorities, in pursuance of the order of court, have opened and graded Markley street from Marshall street northeastwardly a distance of one hundred and seventy feet; and have it partly opened an additional distance of several hundred feet, and propose its im-

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mediate opening to Elm street. From that point it is actually opened to Beech street, a short distance southwesterly from its intersection with Swede street.

The passenger station of the Stony Creek Railroad Company is located at Markley and Main streets. The road eastward then crosses Marshall street at grade, and beyond Marshall street about nine hundred feet distant are located the turn-table and engine-house. There are at least twenty-four trains from Philadelphia whose terminus is at this engine-house, and also four from Lansdale. At least twenty-six engines are required to be turned each day in order to make a return trip.

Markley street between Marshall and Elm streets, being a distance of two blocks, is located southeast of the line of the railroad, and runs parallel to it a distance of eight hundred feet from Marshall street and about eighty feet distant from the railroad.

The Merchants Ice Company is located at the east corner of Marshall and Markley streets, and has switch connections with the railroad, crossing Markley street at grade.

The Adam Scheidt Brewing Company is located east of Markley street, and also has a switch connection with the railroad, crossing Markley street at grade.

The defendant, the Philadelphia and Reading Railway Company, acting by authority of the Stony Creek Railroad Company, now proposes to build a track commencing at a point on their line opposite their turn-table, to connect with the siding of the Adam Scheidt Brewing Company. This track will cross Markley street at grade, at a point distant about one hundred and fifty feet from the grade crossing of the Brewing Company siding, thus making three grade crossings of this street within a distance of five hundred and fifty feet. The proposed track will form with the Brewing Company siding and the main tracks of the Stony Creek Company a completed "Y." The object of this additional track is to enable the defendants to turn their engines and to dispense with the turn-table, which it is claimed is in a dilapidated condition, needing immediate repairs. By using the "Y" as a means to turn the engines it will be necessary to cross Markley street at grade at least fifty-two times daily, and in one-half of these crossings the engine will move backward.

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The borough of Norristown by this bill complains that the action of defendants is (1) without authority of law; (2) that the proposed grade crossing will interfere with the full opening of Markley street and unnecessarily obstruct public travel thereon, and is for the mere convenience and economy of the railroad company and not for the use or convenience of any manufacturing or other industrial establisments.

Markley street, as laid out and partially opened, is of the width of sixty-six feet; and by reason of its location and easy grades promises to become one of the leading thoroughfares of the borough. In the vicinity of the point in question the town is built up and improved; and travel upon this street, when opened, will unquestionably be great.

In the increasing demand for the abolition of grade crossings and the very decided expressions of opinion on this subject by the Supreme Court, the defendant company should show a great, if not an imperious, necessity for their action. If grade crossings in the country are objectionable, more so are those in the heart of a town; and whilst the necessities of trade may require sidings to accommodate manufactories and other industrial enterprises, no such reason can be urged when the only object is to save a slight expenditure of money by the railroad company. When called upon to justify their action we have the testimony of the highest officers of the railroad company that, while a turn-table is feasible and will answer all their purposes, the only reason that can be assigned for the proposed new track is that it will save expense.

In support of this fact we refer to the testimony of Mr. Voorhees, First Vice President of the defendant companies, who when asked:

Q. "Why is a 'Y' used instead of a new turn-table?" answered, "From motives of economy" (page 8).

Q. "Is there any other reason why a turn-table would not answer the same purpose here except that of economy?" answered, "No, sir" (page 9). And on page 11 he said, "The location was determined first purely as a matter of economy."

This testimony was corroborated by the testimony of the Chief Engineer, Mr. Hunter, who was asked:

Q. "Is there any engineering reason why the present location

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of the turn-table should not be the site of a larger or better one, as may be necessary to accommodate your traffic?"

Answer. "There is no engineering reason."

Q. "It is perfectly feasible, isn't it?"

Answer. "It is feasible, but it is objectionable."

Q. "For what reason?"

Answer. "Because it costs much more money." (Page 20.)

This therefore establishes the fact that the action of the defendant company is based upon a mere saving of expense. It is not denied that a turn-table will answer the purpose intended, and therefore before the expense can become a factor governing the case the amount may be important; but when questioned as to what this expense will be, we find from the testimony of the Engineer that the probable cost of improving the turn-table over and above the "Y" construction will be $4,000. According to the plaintiff's testimony the increased cost will be less than $2,000.

The recital of these facts and the admissions of the officers of the defendant company show conclusively that the court ought not to tolerate a grade crossing under these circumstances.

And now, April 2, 1901, it is ordered, adjudged and decreed that a preliminary injunction until final hearing be awarded restraining the defendants, their agents, contractors and employes, from constructing a grade crossing over Markley street, in the borough of Norristown, for the purpose of establishing a "Y" to take the place of their existing turn-table, plaintiffs first to give security in the sum of $1,000.

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IN EQUITY.

THE COMMONWEALTH TITLE INSURANCE AND TRUST COMPANY AND WILLIAM W. FRAZIER VS. THE WILLOW GROVE AND GERMANTOWN PLANK ROAD COMPANY AND JOHN SCHLIMME.

Where a turnpike company is authorized to lay out and open a road not to exceed fifty feet in width, and failed to designate the extent of its appropriation save by the fence lines and stone walls on the sides of the highway which were located at the time the turnpike was built, the sides of the turnpike so marked constitute the outer limits of the company's right of way, in the absence of all evidence showing a different intent.

By taking less than fifty feet the company did not exhaust its power to take an additional strip to the full limit of fifty feet, should the necessities of public travel require such widened highway.

A release given by the abutting land-owner covers only such damages as might result from the original taking, and did not contemplate any damage arising from an additional taking or enlargement of the road-bed.

Trees standing within the limits of the highway as originally defined by said fence lines and stone walls, may be removed if they interfere with the convenient use of the turnpike road.

FINDINGS of fact and conclusions of law upon final hearing. No. 2, March T., 1890.

Evans, Holland & Dettra, Esqs., for complainants.

Louis M. Childs, Esq., for defendants.

The defendant company located and opened a turnpike road over and along the property now owned by the plaintiff, William W. Frazier. Along part of plaintiff's premises the road was opened of a width of less than fifty feet. The turnpike company now proposes to extend the opening beyond the fence line of the plaintiff's property and to the full width of fifty feet.

The present bill was filed to restrain the defendant company from changing the boundaries of the turnpike along the plaintiff's property and from destroying the fences, walls, trees, buildings and other improvements outside of the limits of the turnpike as it has heretofore existed.

The turnpike company alleges that the road was laid out along and over plaintiff's property at a width of fifty feet, and that the proposed opening is the exercise of its right to open the road according to the original location.

Opinion of the court by SWARTZ, P. J., January 26, 1901.

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FINDINGS OF FACT.

First. The defendant company was chartered on the 12th day of April, 1853, P. L. 380, to construct a plank road subject to all the provisions and restrictions of an act regulating turnpike and plank road companies, approved January 26, 1849, P. L. 10, and the several supplements thereto, except that the provisions of the eleventh section of the act of 1849, which restricts plank roads to a width of forty feet, shall not apply to this company, but it may construct a plank road of a width not exceeding fifty feet.

Under the third section of its charter of incorporation the defendant company was given the right to construct its road upon the bed of roads already opened or open a new road for that purpose, or partly upon the bed of roads now open and partly on a road to be opened for that purpose. Further supplements authorized the company to change to a turnpike road or build a turnpike road instead of a plank road. The act of 1849 authorized the laying out of a turnpike road not to exceed fifty feet in width; and at least eighteen feet was to consist of an artificial road made of wood, stone or gravel. In deep cuts it was not required that the road should have a greater width than thirty feet on the surface.

Second. Several surveys were made by the defendant company in 1854 and 1855 along the public highway in front of the property of Ellwood Tyson, under whom the plaintiff claims title. The turnpike was located on the bed of this highway, then called Featherbed lane. There is no record, minute, plot or draft showing the final location of the road, nor is there any record or minute of the company showing the adoption of any specified width for the turnpike. Releases for damages, however, were taken from a number of property-owners along the proposed road, and these all contain a proviso that "the road shall not be opened upon said lands so occupied and used of a width exceeding fifty feet."

The draft marked "B," offered in evidence, is not sufficiently identified to be received as a paper of the company. If identified, it does not appear whether it is or is not one of the preliminary surveys which was rejected or modified. Even if accepted as the final survey, duly adopted by the company, it sheds no light upon the present controversy, for it fails to note any width or side lines of the proposed or located turnpike road. If it indicates anything as to width of road, it shows that the old bed of the highway is made the

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width of the turnpike. We find that the draft is not proven to be a survey of the road actually located by the company.

Third. While the company failed to produce any record or minute fixing the width of the road, we find that the company did in fact open a turnpike fifty feet wide except at some points or sections along its route. No stakes or monuments were planted by the company fixing the outer limits of its highway, but the fences were set back along the route so that the distance from side fence to side fence along the turnpike measures approximately fifty feet. There are some exceptions to this uniform width of fifty feet—notably, in front of a part of the plaintiff's property.

The plaintiff's surveyor found some stones in the middle of the turnpike road,—one is located at the eastern boundary line of the plaintiff's property, the other at the western boundary. At these stones the turnpike is opened fifty feet wide—that is, the distance from these centre stones to the side fences on either side of the turnpike is twenty-five feet. This uniform width of fifty feet continues along the front of the plaintiff's property for eight hundred feet as you approach from the east, and for two hundred feet as you approach from the west. Immediately in front of the buildings and on either side of them for about two hundred feet the turnpike is less than fifty feet wide. At the house front the width is but forty-two feet. As you pass in either direction from the house the road gradually widens, and at the distance of two hundred feet assumes its full width of fifty feet.

There is a stone planted on the north side of the turnpike nearly opposite the plaintiff's house. This stone is twenty-five feet from the centre line of the turnpike as established by the stones set in the middle of the highway at the eastern and western boundary lines of the plaintiff's property. The side fence or wall of the plaintiff's opposite neighbor stands on a line conforming to a road fifty feet wide. If the straight side lines of the turnpike where it is fifty feet wide are continued along the plaintiff's buildings, it will show that the narrowing of the turnpike is due entirely to the protuberance of the plaintiff's side fences and walls. There is no evidence that any of the stones referred to were planted by the defendant company to locate its highway. Those in the middle of the highway indicate property lines, and no doubt existed when the company located its turnpike on Featherbed lane. The stone on the side of the turn-

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pike was planted by Mr. Wentz according to a stake given by the company's surveyor, to enable the owner (Mr. Wentz) to build his wall on the side line of the turnpike. This stone is forty-one and one-half feet from the plaintiff's fence line, measuring directly across the highway.

Fourth. When in 1855 or soon thereafter the turnpike company constructed its road on Featherbed lane, the owners of property along the line of the public highway set back their fences or stone walls. Mr. Ellwood Tyson's eastern front on the old public highway was marked by a stone wall, and this too was set back some feet when the turnpike was built. In front of the buildings the walls remained unchanged. On the western front a building and the fences were moved back. In other words, Mr. Tyson's whole front was pushed back to conform to a road fifty feet wide, except so far as it now stands within the fifty feet line as already described. This change was made about the year 1855, and Mr. Tyson and all subsequent owners maintained this same line for a period of forty-five years. If the line had been pushed back in front of the buildings, the change would have interfered with the convenient use and enjoyment of the property.

There is no evidence that the defendant company or any other person at any time set a stake or stone inside of this line maintained by Mr. Tyson and his successors in title. There is no evidence that the turnpike company at any time prior to the existing controversy claimed to have rights beyond the now existing line. Nor is there any testimony showing that terms or conditions were imposed at the time the front was pushed back to its present site. The front fixed in 1855 was well defined by walls, fences and buildings, and the same line has been definitely maintained by fences, walls, buildings and hedges to the present day.

Fifth. Ellwood Tyson and ten others signed the following release: "Know all men by these presents that we, the undersigned, in consideration of the benefits which may or shall result to us and each of us from the construction of the Willow Grove and Germantown plank road, and also in consideration of the sum of one dollar to each of us in hand paid by the Willow Grove and Germantown Plank Road Company, the receipt whereof is hereby acknowledged, have released and quitclaimed, and we do hereby each one for himself release and quitclaim unto the said company, their successors

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and assigns, all claim or right to any compensation or damages whatsoever which have accrued or which may or can hereafter accrue to us respectively or to our respective heirs, executors, administrators or assigns, for or by reason of the said company entering upon, taking, holding or using any of the lands by us respectively owned or occupied on or along the route of said road for the location and construction of said road or for any or all the necessary and convenient uses and purposes of said road perpetually; provided, however, that said road shall not be opened upon said lands so occupied and used of a width exceeding fifty feet." This release was signed and sealed by Ellwood Tyson on the 16th day of February, 1854.

Sixth. Some maple trees were planted in front of Mr. Tyson's house shortly after the turnpike was constructed. They replaced other trees that were cut down. These maple trees stand within the road limits as it now exists, a few feet from the fence line. By reason of the narrowness of the turnpike at this point, the company has decided that these trees interfere with the traveling public.

CONCLUSIONS OF LAW.

First. The defendant company failed to designate the extent of its appropriation save by the fence lines and stone walls maintained on the sides of the roadway, and the presumption therefore arises that the sides of the roadway so marked constitute the outer limits of the company's turnpike road. The company was not required to build a road fifty feet wide, and the turnpike as it exists in front of plaintiff's property fulfilled the requirements of the charter. When the fences and walls were moved back at the time the road was constructed, and allowed to remain, the company acquiesced in this established side line. In the absence of all evidence showing a different intent, this fence line marked the limits of the company's location. The acquiescence in this line for forty-five years strengthens this conclusion.

Second. The turnpike company did not exhaust its power to take an additional strip to the full limit of fifty feet in front of plaintiff's property, should the necessities of public travel require a road fifty feet wide in front of plaintiff's buildings.

Third. The release offered in evidence covered only such damages as might result from the original location and opening of the

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road. It did not contemplate any damages that might arise from a second or subsequent taking and enlargement of the highway.

Fourth. The trees standing within the limits of the highway as now defined by plaintiff's fence line, may be removed if they interfere with the convenient use of the turnpike. Whether they do so interfere is a matter within the sound discretion of the defendant company.

Fifth. The plaintiff is entitled to an injunction restraining the defendant company, its superintendent and employes, from taking and occupying any of plaintiff's land outside the limits of the turnpike as it has heretofore existed until the damages for such taking and occupancy are paid or secured by the defendant company.

REASONS IN SUPPORT OF OUR CONCLUSIONS.

There are no material facts in dispute. The extent or limit of the original location is a question of law and fact. If we give to the admitted facts their legal significance, the original location does not extend beyond the present limits of the turnpike as now opened to travel.

When the company opened the turnpike a new line was established along the front of the property now owned by plaintiff. The old side line of Featherbed lane was pushed back for the greater portion of the plaintiff's front. This new boundary line was fixed by the stone wall along the eastern front and by a new fence line and a building moved back on the western front. The line immediately in front of the farm buildings was not changed. The new line was well marked by a permanent stone wall along the eastern front, which was moved back some feet—except near the farm buildings—when the turnpike was opened.

The land-owner gave his ground, moved his walls, moved a building, and released his claim for damages. It seems pretty evident that the line established to meet the needs of the turnpike was a compromise line agreed upon to save the convenient use of the land-owner's buildings. If it was then understood that the company took the ground and improvements to the line now claimed by it, the liberality of the land-owner is inexplicable. We would have the fact that he gave his land, moved his wall, fences and a building, and allowed his porch and entrance to his barn and house to be destroyed without any demand for compensation.

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What is the legal significance of this changed, fixed and well defined side line?—a line changed to meet the needs of the turnpike at the time the road was built and opened. This is not the case of Stevenson's Appeal, 17 W. N. C., 429, where the company did not use its full sixty feet limit in opening the road to travel, but marked the sixty feet exterior line by planting marble stones. The defendant company was not required to take fifty feet, and there is not a particle of evidence that it took an inch beyond the walls and fence lines of the plaintiff's property. True, the full width of fifty feet was taken along the other portions of the route; but this fact is established not by stones or monuments but by the fence lines then established. The changed walls or pushed-back fences are the only evidences to fix a taking of fifty feet. The company took fifty feet because the distance between the established fence lines on the sides of the road measures fifty feet. If the established fence lines is the method of determining the extent of the location in all other cases, why should not the same method fix the limit of the taking in front of the plaintiff's property?

It is claimed that the defendant company is entitled to the full fifty feet in front of plaintiff's buildings because of the presumption that it took originally all it was allowed to take under its charter. A distinction is drawn between a grant to build a road fifty feet wide and one to build a road not "to exceed fifty feet in width": Philadelphia and Reading Railroad Co. vs. Obert, 109 Pa., 203.

"If this were a proceeding to assess damages for the original taking, and the company had entered upon and constructed their road over plaintiff's land, doing nothing to indicate an appropriation less than four rods in width, it would be presumed, of course, in the first instance, that the taking was to the full extent allowed by law, because until the company, by some decisive act, has chosen to take less, it is entitled to the full width. After the purchase of the right of way, however, in a contest involving its lines the company must establish the extent of its ownership in the same manner and according to the same measure of proof as others": Railroad Co. vs. Obert, *supra*.

The defendant company had the right to take land "not to exceed fifty feet in width." It chose to take less and fixed its lines of taking, obtained a release from the land-owner, and under the rulings in Obert's case it has failed to show any title beyond the line

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so established in 1855. But suppose the presumption arises that the company took the full fifty feet, it may nevertheless be removed by evidence of actual possession taken of less ground—that is, a possession of less ground indicated by monuments fixed by it or by the land-owner with the company's knowledge and acquiescence: West Chester Railroad vs. Goddard, 11 Central, 829. It is true plaintiff can not acquire title against the defendant by encroachment and adverse user; but in this case a line was fixed by changing the existing front line, and this was done at the time the turnpike was opened. It is not a question of encroachment on the part of the plaintiff. If the turnpike company had macadamized the roadbed of the old highway in front of plaintiff's property without any changes in the walls and fence line, the presumption of a taking of fifty feet might rest on a better basis.

It is said that the line fixed in 1855 was but a temporary side line, tolerated for the convenience of the property-owner. There is no evidence of any agreement or understanding to that effect; and the line remains unchanged to-day, nearly half a century after it was established.

May the defendant company at this late day take an additional strip of ground and enlarge its roadway to the fifty feet limit authorized by its charter?

This question has not been passed upon by our Supreme Court, so far as our investigation discloses. We see no good reason for denying this right to the company. The Legislature determined that a width of fifty feet might be required. The grant was given because it was deemed beneficial to the public. If the right to a future appropriation is withheld, this serious difficulty will arise that a company must take and pay in advance for the use of ground which it may never in fact need at all, or by taking too narrow a view of the future its business may grow beyond any reasonable anticipation and it will find itself wholly unable to discharge its duties to the public: Lewis on Eminent Domain, Sec. 259. A railroad company may take additional ground for right of way, if it keeps within its charter limits of sixty-six feet. This clearly follows from the reasoning laid down in Philadelphia and Wilmington Railroad Co. vs. Williams, 54 Pa., 103. Speaking of the plaintiff company in the case just cited, the court say: "It would be an unreasonable construction of its charter to require provision to be made

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or all the unknown wants of the future. The increase in trade and business, and the changes taking place, often require new and increased facilities." In the Obert and Goddard cases additional ground was taken not exceeding the charter width, and the right to do so was conceded provided the damages were secured. In neither of these cases did the railroad company pretend to move under the widening act of 1869.

The present case is a good illustration of the hardship which arises if future appropriation is denied. The company must pay fifty years in advance or the public must be denied an inadequate highway at the end of that period.

If the widening to fifty feet requires a second or independent taking, it follows, we think, that the release of 1854 does not cover the damages for such additional appropriation. The release covered all the damages for the location and construction of the road actually laid out and opened, and for all damages that might accrue from such location and construction. The parties contemplated the damages for the road then under consideration. The company might have taken the full fifty feet under the release without further compensation. It elected to take less "for the location and construction of said road." True, the release is comprehensive and provides for damages which may hereafter accrue; but these future damages are all referable to the injury which may at any time flow from the location then in contemplation, and which was made certain by the boundaries thereafter fixed. "Said road" was the road located in 1855, and not the enlarged highway which had no existence even in location until 1900.

The release is comprehensive; it is as broad as it can well be made for the location selected by the company; it embraced all that was taken, but did not cover anything that was not taken. The grants in the Obert and Goddard cases were as sweeping as the release of Ellwood Tyson.

There is no evidence before us that the managers of the company are in error in deciding that the trees now standing within the highway are an interference and dangerous to the traveling public. If the road were fifty feet wide, and the trees stood within a few feet of the exterior line, their judgment no doubt would be different. We may say, however, that this tree question is not raised by the

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bill. The plaintiff does not complain of any threatened interference with trees standing within the limits of the highway as now opened.

And now, January 26, 1901, it is ordered, adjudged and decreed that the Prothonotary enter a decree nisi enjoining the defendant company from taking and occupying any of plaintiff's ground outside of the limits of the turnpike in front of his property, as the turnpike has heretofore existed, until the damages for such taking and occupancy are first secured or paid; and unless exceptions are filed, as provided by the equity rules, he will enter a final decree as of course.

IN EQUITY.

MARY DARRAH, WIDOW OF SAMUEL JONES DARRAH, DEC'D, AND THE ALBERTSON TRUST AND SAFE DEPOSIT COMPANY, GUARDIAN OF BESSIE L. DARRAH, A MINOR, VS. PERCIVAL W. DARRAH, THOMAS W. DARRAH, EDNA J. DARRAH, JAMES B. DARRAH AND THOMAS J. DARRAH.

A deed to A, his heirs and assigns, in trust for the children and heirs, share and share alike of the said A, vests an absolute estate in the then living children of A; and an after-born child takes no interest in the grant.

Where in a deed the words "children" and "heirs" are used indiscriminately, in order to harmonize the two parts of the deed, the word "children" will be substituted for the word "heirs" in the habendum: Warn vs. Brown, 102 Pa., 347.

The words in the premises of the deed read "children" and "heirs." As a conveyance to the heirs of a living person is void for uncertainty, the word "heirs" will be construed as used synonymously with "children." In this case the widow of A and a child born after the execution and delivery of the deed applied for partition. As A took no estate in the land, his widow had no standing; and as the estate vested immediately upon the delivery of the deed, only the children of A then living were included in the grant. Partition was refused.

DEMURRER to bill. No. 1, June T., 1900.

Evans, Holland & Dettra, Esqs., for plaintiffs.

N. D. Tyson, Esq., for defendants.

Opinion of the court by WEAND, J., April 16, 1901.

This case comes before us on a general demurrer to plaintiffs' bill, which asks for a partition of land conveyed by a deed whose peculiar phraseology has given rise to dispute as to ownership. The

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petitioners are the widow and minor child of Samuel Jones Darrah, and the defendants are other children of said Darrah.

The parties to the deed are Thomas B. Darrah, grantor, and Samuel Jones Darrah, grantee. The deed sets forth that "the said party of the first part, for and in consideration of the sum of one dollar, and the natural love and affection, lawful money of the United States of America, well and truly paid," etc., "has granted," etc., unto the said party of the second part, his heirs and assigns, in trust for the children and heirs, share and share alike of the said Samuel Jones Darrah, all that certain messuage," etc., "reserving one room in the northwest corner of the second story of the dwelling-house, and a living with the said Samuel Jones Darrah so long as the said Thomas B. Darrah shall survive, with all the comforts and conveniences he has ever enjoyed. To have and to hold the said premises, with all and singular the appurtenances, unto the said party of the second part, in trust for his heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever."

The habendum also uses the words "heirs and assigns" in connection with the party of the second part.

Thomas B. Darrah died intestate in 1889, unmarried and without issue, and leaving to survive him no brothers or sisters of the whole blood but the issue of a deceased brother, James Darrah, who died intestate in 1868, to wit: Samuel J. Darrah, now deceased (grantee in the deed), and James B. Darrah and Thomas J. Darrah, both living. Samuel Jones Darrah died intestate on September 16, 1897, in California, leaving to survive him a widow, Mary Darrah, plaintiff first above named, and four children, to wit: Bessie L. Darrah, Percival W. Darrah, Thomas W. Darrah and Edna J. Darrah, all of whom are of full age and *sui juris* except the said Bessie L. Darrah, who is a minor, having for her guardian The Albertson Trust and Safe Deposit Company, of Norristown, Pa.

Bessie L. Darrah, one of the plaintiffs, was born October 4, 1897, of a second marriage of said Samuel Jones Darrah, and consequently was not in being at the date of the deed.

Percival W. Darrah, Thomas W. Darrah and Edna J. Darrah, three of the children of Samuel Jones Darrah, deny the jurisdiction of the court to make partition as prayed for, upon the ground: first, that Samuel Jones Darrah did not have any estate or interest in the

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land, and therefore his widow has no standing to ask partition; and second, that as Bessie L. Darrah was not *in esse* at the time of the grant, she can not be included under the designation "children," as contemplated by the deed, and therefore she has no standing to demand partition.

It is our duty so to construe this deed as, if possible, to carry out the intention of the parties, and to give to each part its proper and legal effect. The frequent use of the words "in trust" rebuts the idea that an absolute estate was intended to be granted to Samuel Jones Darrah, for if the grantor intended an estate in fee simple the words "in trust" would be inconsistent. See Warn vs. Brown, 102 Pa., 347. Nor are there any words or terms used which give him a life or other estate to his own use: Warn vs. Brown, *supra.*

A conveyance to the heirs of a living person is void for uncertainty: Morris vs. Stephens, 42 Pa., 200; and therefore no estate passed to any person under that designation. If we strike out the word "heirs" in the premises, it leaves the grant to the children of said Samuel Jones Darrah; or if we construe the word "heirs," as used indiscriminately and synonymously, with "children," we have the same result. In Huss vs. Stephens, 51 Pa., 282, where the grant was "to the heirs of Andrew Lantz, Jr.," "in consideration of the natural love and affection he hath for his grandchildren," the conveyance was held good, and the word "heirs" applied to the grandchildren as persons in being and competent to take.

We can not see, therefore, why the conveyance up to this point was not good to Samuel Jones Darrah in trust for his children.

Do the words in the habendum "in trust for his heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever," change or destroy the estate first granted?

The purpose of the habendum is to define the extent of the interest granted, if that interest has not already been defined; and whilst it may be used to explain or qualify the grant, as set forth in the premises, it can not be used to defeat it: Tyler vs. Moore, 42 Pa., 374.

If the habendum be absolutely repugnant to the premises, if it can not be reconciled with them, so that full effect can be given to both, it must give way, and the premises must stand. In a deed the premises will prevail: Ibid.

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In this case, therefore, if the habendum by the use of the words "his heirs and assigns" is repugnant to the premises which give the land "in trust for his children," the premises will prevail; but, in addition, the habendum in one part is "in trust for his heirs and assigns."

In Warn vs. Brown et al., *supra*, it was said: "Where in a deed the words 'children' and 'heirs' are used indiscriminately, in order to harmonize the two parts of the deed, the word 'children' will be substituted for the word 'heirs' in the habendum."

As we view the case, this grant was to Samuel Jones Darrah in trust for his children, their heirs and assigns; and the only remaining question is as to the interest of Bessie L. Darrah, and this will depend upon whether Samuel Jones Darrah took any interest in the land.

It is contended by plaintiffs that the condition or reservation reserving one room in the northwest corner of the second story of the dwelling-house, and a living with the said Samuel Jones Darrah so long as the said Thomas B. Darrah shall survive, with all the comforts and conveniences he has ever enjoyed," conveys a life estate to Samuel Jones Darrah. If so, his after-born child would be included amongst his children.

But we can not so construe the grant. No mention is made of any title or interest to vest in him. True, the natural love and affection is that existing between Thomas and Samuel; but this may be a good consideration for the gift to the latter's children. Samuel is but a dry trustee, or conduit, through whom the estate vests in his children. The deed may reserve a room in the house and a living and maintenance by Thomas with Samuel at another place; and if Samuel accepted the deed for his children he might be liable for the condition, but it gives him no interest in the land itself.

The law is well settled that where there is an immediate gift to children, those only living at the testator's death will take; but it is now well settled that where a particular estate is carved out, with a gift over to the children of the person taking that interest, or of any other person, the limitation will embrace not only the objects living at the death of the testator but all who shall subsequently come into existence before the period of distribution: Minning vs. Batdorff, 5 Pa., 503; Gross's Estate, 10 Pa., 360; Landwehr's Estate, 147 Pa., 121.

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Here the grant is immediate. There are persons in being competent to take, and there is no particular estate with a gift over. The estate granted vested immediately upon the execution and delivery of the deed, and only those then in being who answered to the description could take as grantees. As the widow is not entitled to dower, and as Bessie L. Darrah, the other petitioner, has no estate or interest in the land, their request for partition must be denied.

And now, April 16, 1901, the demurrer is sustained and the bill is dismissed at costs of plaintiffs.

Orphans' Court of Montgomery County.

Estate of Matthias Campbell, Dec'd.

A daughter can not recover compensation for nursing her father in the absence of a promise to pay for the services. Expressions of gratitude and appreciation and an intent to do something in the future for the daughter do not establish a contract.

Where the services were rendered in expectation of a legacy, the daughter if disappointed by the will may not recover on a *quantum meruit*.

Exceptions to report of auditor.

Harvey L. Shomo, Esq., for exceptant.

John T. Wagner, Esq., contra.

Opinion of the court by Swartz, P. J., February 18, 1901.

The decedent went to the house of the claimant, his daughter, and at her invitation. She told her brother at the time the father came to her home that she would take care of him. She was to receive ten dollars a month for boarding him, and this sum was paid at regular intervals. For the last two months of his life the father paid her at the rate of twenty dollars per month.

The father remained in the home of his daughter for a year and a half, up to the time of his death. He was old, feeble, sick, and required nursing for the greater part of the time. He frequently lost control of his bowels and urine, and the services rendered by the daughter were often of an unpleasant character.

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He had the same physical weakness while boarding with another daughter, Mrs. Yocum, who rendered similar services to him. While these services were rendered he frequently declared to Mrs. Yocum she would be well paid for her attentions. The decedent made a special legacy of two hundred dollars in favor of Mrs. Yocum. Later, while in the home of the claimant, Mrs. Reifsnyder, he made a new will, and therein the special legacy to Mrs. Yocum was reduced to fifty dollars.

When the claimant was engaged in these attentions to her father he would say in the presence of the members of her family, "Annie, I know I am an awful lot of care, but you shall be well paid for this." To which the daughter would reply, "Never mind, pap, don't worry about that," or "Never mind, pap, it is only right."

At other times the father said, "You shall be well paid; Uncle Eddie will pay you," meaning thereby that his son Edward would pay her. Edward is named as one of the executors in the father's will. At other times he said he would have his will changed and pay the claimant by providing for her in the will. To all these declarations of gratitude the daughter never indicated that she expected any compensation or that she rendered the services from any other motive than that of love and affection for her father. She would not permit the father to discuss the subject of compensation in her presence. The single exception to her uniform reply not to bother about it is found in her answer on one occasion when she said, "No, I won't; unless it is down on paper I will not get it." The father replied, "Yes, you will; Uncle Eddie will pay you." After this alleged conversation the father changed his will, but made no special provision for the claimant other than by the reduction of Mrs. Yocum's legacy and by making the claimant's husband a beneficiary to a slight extent. The will gives the claimant an equal share with the other children, and this share is slightly increased by cutting down Mrs. Yocum's legacy.

This evidence fails to show a contract to pay for the nursing. There was an agreement as to the board, but nothing more. The declarations of the father show an intent to do something in the future; they are expressions of gratitude and appreciation that are not unusual where a parent receives filial devotion. In this case they show an intent to make provision for the daughter by will: Barhite's Appeal, 126 Pa., 404. The will made subsequent to these

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declarations must be taken to express the father's executed purpose. When the time came to carry out his intent the legacies to the daughter and her husband were deemed by him compensation for the services rendered. We may consider the provision inadequate because her share is no greater than that of each of the sisters; but the claimant is in no position to complain. She has no contract on which she can bring suit. She bestowed the services not for a money consideration but because she was the daughter of a parent who needed them. It is even doubtful whether she had any expectations of compensation through her father's will. She knew she had no claim unless her father put it in writing. But if she rendered the services in expectation of an increased share in her father's estate, she took her chances; and if disappointed, she can not recover anything: Miller's Estate, 136 Pa., 248.

This case falls within the rulings in Ulrich vs. Arnold, 120 Pa., 170, and Zimmerman vs. Zimmerman, 129 Pa., 229. In each of these cases the decedent frequently stated that he was a great trouble and the claimant should be well paid for it, or that he should be well paid for all he did for him if it took all he had. In the Ulrich case, just as in the claim before us, the payment was to be made to the child after the father's death; and the language used by Justice Green will apply with equal force to the facts now under consideration. He says: "Having this sense of his responsibility it might well be expected that if he really intended to make payment for the filial services of his daughter in nursing him, he would at least take some pains to define with certainty the limits of his obligation in that regard." And we add if he made a will subsequent to these declarations, we should expect to find ample provisions therein in discharge of his sense of responsibility. The court continues: "And it would also be expected that if the son-in-law or the daughter intended to claim compensation in money for the filial services of the daughter in nursing her father during his sickness and his suffering, they would have made such demand or at least expressed their intention to do so or their desire for such compensation during the life-time of the father. In point of fact, there is not a shred of such testimony in this case. Not a witness has testified to the least expression of even a desire for compensation by the plaintiff or his wife at any time during the life of the deceased."

In the claim before us Mrs. Reifsnyder made no demand upon

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her father; but, on the contrary, whenever the subject of compensation was mentioned, she declared she was doing only what was right—that is, from a sense of filial duty.

The auditor considered the claim with great care, and we can not disturb his able report. The earnest argument of counsel and his well prepared brief have been carefully considered; but under the law and facts of the case Mrs. Reifsnyder's claim can not be allowed. She was a truly faithful daughter, and the other children who did not share the burden of nursing with her would honor the memory of their father by uniting in some recompense to their sister.

And now, February 18, 1901, the exceptions are dismissed and the report of the auditor is confirmed.

Court of Quarter Sessions of Montgomery County.

In re Vacation of Eastburn Road.

A road report which states that no damages were claimed—the parties entitled thereto being present before the viewers—is equivalent to a finding that none have been sustained.

An exception that no damages were assessed, filed on behalf of certain citizens, without stating that either was entitled to damages, will not be sustained.

Although a road will not be vacated or laid out in a township if the result be a blind road or *cul de sac*, yet a different rule may prevail in a borough.

The road asked to be vacated was the dividing line between a borough and a township, the dividing line being the centre of the road. Two petitions were presented asking for the vacation of the road. To vacate the part in the borough the consent of town council was necessary. The court appointed the same jury on each petition, and both juries reported favorably to the vacation. *Held*, to be regular under the circumstances.

Whether damages can be recovered for the vacation of a public road, not decided.

Exceptions to report of viewers.

H. M. Brownback, Esq., for Upper Merion township.

James Boyd, Esq., contra.

Opinion of the court by Weand, J., February 18, 1901.

The road known as the Eastburn road, part of which is asked to be vacated, is the dividing line between the borough of Bridgeport and Upper Merion township, the middle of the road being the

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dividing line. The part asked to be vacated crosses the Philadelphia and Reading railway at grade, and is said to be dangerous, inconvenient and useless.

The road coming from the southwest intersects Fourth street, which continues on into Upper Merion. After the Eastburn road crosses the railroad northeast, it extends to Third street of the borough.

By the vacation of the part covered by the railroad the unvacated part from Fourth street to the railroad on one side and from the railroad on the other side to Third street, will have no outlet after reaching the railroad, so that persons entering from Third or Fourth streets would have no means of egress except by retracing their steps.

Bridgeport is a thriving manufacturing incorporated borough, and requires house accommodations for the numerous employes engaged in the various factories, etc., or employed by the railroad company. By the act of May 9, 1871, P. L. 639, the Court of Quarter Sessions of Montgomery county has authority, by and with the consent of the town councils, to lay out, vacate, etc., any streets, etc., within the limits of any incorporated borough in said county.

As one-half of the road proposed to be vacated lies within the limits of the borough, the petitioners conceived that two proceedings were necessary to effect their purpose, and they therefore applied by one petition to vacate that part within the borough, with the consent of the Town Council, and by another petition to vacate that part within the township of Upper Merion. The same viewers were appointed on each petition. Two reports were made, each favorable to the petitioners, and in each report it was stated that no damages were claimed.

Exceptions, identical in character, were filed to each report, and we may therefore consider them together.

Exceptions 1 and 2 complain that the reports do not show that the viewers attempted to obtain release of damages from the owners abutting or fronting on said road, nor did they assess any damages.

There are three valid answers to these exceptions.

1. No land-owner claiming or entitled to damages has filed exceptions to the reports. The exceptions are signed by "attorney for plaintiff," on behalf of "divers citizens of the borough of Bridgeport and the township of Upper Merion"; but we are left in igno-

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rance as to who these citizens are, or whether any of them would be entitled to damages even if the law assured damages in such cases.

2. The depositions show that opportunity was given at the hearing for any person to claim damages, and that none were claimed.

3. In re Road in South Abington Township, 109 Pa., 118, it was held: "Nor is it necessary to the validity of a report that the viewers should state in it that they have endeavored to obtain releases, nor that in the assessment of damages they have taken into consideration the advantages accruing to the land-owner from the opening of the road. It will be presumed that the viewers performed their duty, and that all things were rightly done, unless the contrary be shown. That this is the rule under the act of 1845 was decided in McConnell's Mill Road, 8 Casey, 285, and in Road in Chartiers, 10 Casey, 413; and the general act of May 14, 1874, contains precisely the same provision in this respect."

In Road in Kingston Township, 134 Pa., 409, it was ruled that "under Section 2, act of February 24, 1845, P. L. 52, providing that if viewers shall decide in favor of locating a public road, and it shall appear to them that any damages will be sustained, it shall be their duty to assess and report the same. An omission to assess and report damages is equivalent to a finding that none have been sustained."

The act of 1845, referred to in above cited cases, is identical in language with the act of 1874, which it is complained was not followed; and in South Abington Township Road, *supra*, this fact is commented on. In this case the jury did report upon the question of damages, for they state that none were claimed. If none were claimed, and the parties appeared, releases would be useless.

In North Union Township Road, 150 Pa., 512, cited by exceptants, it did not appear that notice was given to the land-owners of the time and place fixed for the assessment of damages; nor did it appear that the viewers considered the question of damages at all, etc. The expression in the per curiam opinion "while it was entirely proper to set aside the report of the jurors for the reason that they made no effort to obtain release of damages from the property-owners" must be taken in connection with the other facts which controlled the lower court, and not as laying down a general proposition at variance with the other cases cited. With this view of the case it is not necessary to pass upon the question as to whether

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damages are recoverable for the vacation of a public road in Montgomery county. See McGee's Appeal, 114 Pa., 470.

Exceptions 3, 4 and 8 complain that by simply "vacating that part of the road which crosses the Philadelphia and Reading Railway Company it creates two blind roads, one leading from Fourth street to the railroad on the southwest side thereof and the other leading from the said railroad to Third street on the northeast side thereof; and that neither the draft nor report shows what portion of the road remains unvacated," etc.

The draft and report we think very definitely set forth what portion is vacated, being the part asked to be vacated, and of course the balance remains unvacated.

The first part of the exception might be good if this road was wholly in the township; but we must keep in view the locality and surroundings. The road borders on the borough; and even if it is a *cul de sac*, it is not necessarily on that account objectionable. The property-owners may want to lay it out in building lots giving them a front on a street, or erect factories, etc., although there might be no ingress or egress at one end. By leaving these portions unvacated it leaves the properties bordering therein available for various purposes, when a vacation would entirely destroy their value. Blind alleys, no thoroughfares, courts and *cul de sacs* are not uncommon in cities and boroughs, and a glance at the draft will show that great injury will be done by vacating this road between the points mentioned; whilst the short distance from Fourth street to the railroad can cause no great inconvenience to a person entering that part. On the other side of the railroad there are already improvements which would be destroyed or injured by a vacation.

The seventh exception denies the power of the court to vacate the road, because the same lies partly in the borough and partly in the township.

That this can be done was ruled in Priceville Road, 4 Del., 106; Winter Street, 6 Montg., 24; Somerset and Stoystown Road, 74 Pa., 61; Palo Alto Road, 160 Pa., 104. By the act of 1871, *supra*, the court has power to vacate streets in boroughs.

The tenth exception relates to the two petitions.

We think this was useless, and might give rise to serious difficulty if the juries should disagree or if either municipality had presented a valid exception not common to both. But whilst irregu-

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lar, the proceeding up to this point is not necessarily fatal, and the court can treat the matter as one proceeding. The object is identical in both petitions, which were presented at the same time and on which the same viewers were appointed, and whose reports agree. No one has been injured; and if both reports are confirmed, we can not see how any difficulty can arise. With a disposition to abolish dangerous grade crossings, such as this is represented to be, we will not set aside an otherwise good proceeding for a mere irregularity working injury to no one. We might well dismiss these exceptions, because they fail to give us the name of any one in whose behalf they are filed. Who can we call upon to stand sponsor for the exceptions? And why may not a large body of the "citizens" complain that impliedly they are objecting to a matter in whose favor they really are?

By the act of May 16, 1891, P. L. 90, "the Court of Quarter Sessions shall have power in all proceedings therein for the opening or vacating of roads, streets or highways, to make such order for the payment of the costs in each proceeding as to the said court shall seem just and proper." And if we were disposed to exercise that power in this case, we would be powerless to make the order for want of known persons on whom to impose the costs.

The other exceptions are without merit and need no discussion.

And now, February 18, 1901, the exceptions are overruled, and reviewers will be appointed on the petition filed.

Court of Common Pleas of Montgomery County.

MICHAEL MURPHY, DENNIS MURPHY, ANNIE MURPHY AND JULIA MURPHY, AND STEPHEN BOLGER, JAMES BOLGER, PETER BOLGER, JOSEPH BOLGER AND JOHN BOLGER, HUSBAND AND CHILDREN OF ELLEN BOLGER, DEC'D, VS. LAWRENCE F. O'BRIEN.

Prior to the act of June 3, 1887, P. L. 332, the earnings of the wife, her efforts and her credit, belonged to the husband. To establish title by parol gift through declarations to third persons the declarations must not be equivocal in character but must have such clearness and directness as to leave no doubt of their meaning and purpose. Between parent and child, husband and wife, they are so easily misapplied or misunderstood that courts will give little force or effect to them.

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Murphy et al., &c., vs. O'Brien.

Upon the death of the husband the widow can not show title to his real estate by adverse possession where the children live with her upon the premises, unless she can show some clear, positive and unequivocal act amounting to an ouster. Mere declarations will not answer the purpose

In ejectment by the next of kin of the husband against a devisee of a widow, the latter can not hold the possession of the property as a pledge till he is repaid the money expended by the widow in satisfying a mortgage against the husband's property. It would seem that the satisfaction of the mortgage may be stricken off if the widow paid her money in the honest belief that she was the owner of the property.

SUMMONS in ejectment. No. 129, June T., 1898.

Neville D. Tyson, Esq., for plaintiffs.

Edward F. Kane, Esq., for defendant.

Opinion of the court by SWARTZ, P. J., May 27, 1901.

The plaintiffs brought ejectment for a house and lot situate in the borough of Norristown. A conveyance was made to John Murphy by deed dated March 9, 1864. The plaintiffs show title as the next of kin of John Murphy. The defendant claims title by parol gift from John Murphy to his wife, Catharine Murphy, and adverse possession by her in pursuance of the alleged gift. The defendant is the sole legatee under Catharine Murphy's will.

After all the evidence was submitted, the parties and their counsel agreed to dispense with a trial by jury and referred the case to the court for determination, as provided by the Act of April 22, 1874, P. L. 109.

FINDINGS OF FACT.

1. John Murphy was a soldier in the Civil War, and he was wounded at the battle of Antietam. He returned to Norristown in the spring of 1864. He had three hundred dollars bounty money, and his wife had saved one hundred dollars out of her earnings during the absence of her husband. They had one child, Maggie, then about two years old. On March 9, 1864, he purchased the house and lot now in dispute. He paid four hundred dollars, using the said three hundred dollars bounty money and the one hundred dollars given to him by his wife. The consideration named in the deed is eight hundred dollars. The property was encumbered with a mortgage given by a prior owner. The receipt shows that the cash so paid and the existing mortgage of four hundred dollars constituted the whole purchase money.

2. On the day he purchased the house he told his neighbor "he was going to buy a house for his wife, so she would have it, for

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he was going to the war and never would return." After the purchase he told the same neighbor "he bought the house for his wife to have a home," that "he bought it for her to have it, for he would never come back." "He took a blanket off the bed and said he would take it along for his coffin." Other witnesses testified to similar declarations. "I am going to buy the home for my wife, if I can, and may be I will never see it again"; "Now, if I never come back, as I don't think I will, this will be for my wife"; that "he had bought the house for his wife Kate." There was also evidence as to declarations by the wife to her friends and neighbors "that the property was hers, that she had to pay the mortgage against it, that he bought it for her," "that it was her property and that she had worked hard to pay for it," "she always said it was her home, whenever she spoke of it, it was her house."

3. John Murphy, the husband, returned to the army a few days after he purchased the property in question. On March 28, 1864, he wrote to his wife from Annapolis, Md., saying, among other things, "Did you notice them people out of your house yet?" About April 1, 1864, the wife and daughter moved into the house. On May 6, 1864, John Murphy was mortally wounded in the battle of the Wilderness, and died intestate on the 12th of the same month. The widow remarried in 1873. A son was born in 1875, who is now the defendant in this suit. The daughter died January 15, 1884, of full age, intestate and unmarried. The mother died, testate, November 17, 1896. She outlived her second husband; her son, the defendant, is her sole legatee. The mother and daughter continued to occupy the house until the time of their respective deaths.

4. The taxes on the property were paid by Mrs. Murphy from 1864 to 1896. They were assessed in the name of John Murphy from 1864 to 1867, in the name of Catharine Murphy from 1867 to 1873, and in the name of Catharine O'Brien from 1873 to 1896. Mrs. Murphy married Patrick O'Brien in 1873.

5. A small frame back kitchen was built in the life-time of Mrs. Murphy, but after her marriage to Patrick O'Brien. There is no competent evidence to show how it was paid. Patrick O'Brien, the husband, was the owner of a property; that he paid some of the repairs is shown by the admission of the wife to her neighbors. Some repairs were made to the property from time to time.

6. Mrs. Murphy purchased the mortgage of four hundred

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dollars which was a lien against the property. She took an assignment in her own name as early as February 7, 1865, and satisfied the incumbrance June 6, 1884—that is, a few months after her daughter's death.

7. The statement by Murphy on his return to the army that he did not expect to return, referred to his fear that death might overtake him; he had no thought of abandoning his wife and child. He speaks of them in his letter with love and kindness, and in the hope of a speedy return to them.

8. There is no evidence of a contract or gift which brings the husband and wife face to face, nor is there any evidence of statements or declarations made in the presence of each other.

9. The declarations of the husband to the friends and neighbors are all consistent with the thought that he invested his money in a home for the wife and child without any intent to divest himself of the ownership of the property.

CONCLUSIONS OF LAW.

1. The earnings of the wife, if any entered into the purchase money of the property, belonged to the husband. There is no evidence other than declarations to third persons that the wife furnished one hundred dollars.

2. The evidence of a parol gift to establish title in the wife is insufficient. The declarations are too indefinite to constitute a contract, and the improvements are inadequate to establish a consideration.

3. The adverse possession was not exclusive as against a husband in the army or as against a child occupying the house with the mother. In the life-time of the husband she held the possession for the husband and herself; after his death, she continued the possession in the right of her dower and title of her child; and after the death of the child she took a life interest in the property under the intestate laws.

4. The defendant is not entitled to compensation for improvements; even if entitled, there is no evidence before us from which we can determine their value.

5. The defendant is not entitled to a conditional verdict to recover the money paid in satisfaction of the four hundred dollars mortgage. The source of payment is not clearly disclosed; and if

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paid out of the income of the property it was payment in great part by the daughter, to whose rights and interests plaintiffs succeeded.

REASONS IN SUPPORT OF OUR FINDINGS AND CONCLUSIONS.

The improvements testified to all fall within the class known as repairs, except the back kitchen; and we have no evidence as to the extent, character or cost of this back building. It may have been built out of the income of the property.

This is a proceeding at law and not in equity, and "the principle of the common law is that the rightful owner is under no obligation to pay for improvements which he never authorized": Gregg vs. Patterson, 9 W. & S., 209; Putnam vs. Tyler, 117 Pa., 570. But, as already shown, there is no evidence from which we could value the improvements, even if the law allowed a recovery for them.

Under the law as it stood in 1864, when the husband purchased the house and lot, the earnings of the wife, her efforts and her credit belonged to the husband: Leinbach vs. Templin, 105 Pa., 522. According to the declarations, she gave him the one hundred dollars. There can be no resulting trust in her favor, for there is no attempt to show that the money was to be applied in purchasing property in her name or that there was any mistake or fraud in taking the deed in the name of the husband.

The defendant claims by a parol gift to his mother. "To take the case out of the operation of the statute of frauds the gift must be shown by full, complete, satisfactory and indubitable proof—that is to say, such proof as is creditable and of such weight and directness as to make out the facts alleged beyond a doubt: Hart vs. Carroll, 4 Norris, 510. The evidence must designate the land, must show that open, notorious and exclusive possession was taken and maintained under and in pursuance of the gift; that the improvements which constitute the consideration were made on the faith of the promised conveyance; that compensation in damages would be inadequate, and rescission therefore unjust and inequitable": Allison vs. Burns, 107 Pa., 50.

Where the party relies on declarations, they must not be of an equivocal character; they must have such clearness and directness as will leave no doubt as to their meaning and purpose: Edwards vs. Morgan, 100 Pa., 330; Sowers vs. Weaver, 84 Pa., 262.

"Declarations are an unsatisfactory species of evidence on ac-

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count of the facility with which they may be fabricated, the impossibility of contradicting them, and the mistakes and failures of recollection": Robertson vs. Robertson, 9 Watts, 42. As between parent and child, husband and wife, they are so easily misapplied or misunderstood that courts will not give them the same force and effect that are given to similar declarations where they are offered to establish a contract between strangers. Applying these principles, we find that the claim of the defendant is divested of every legal support.

The declarations were all made to third persons and not in the presence of the husband and wife. They mean no more than a purpose to secure a home for the wife and the assurance that such a home was secured. He intended to return to the army, and instead of spending the money foolishly, as was his habit, according to the letter written to the wife he invested it in a home for the wife and child. As he did not expect to be at home to enjoy the house with her, it was but natural to speak of it as "her home," or "a home for her," or "a house for her." So when he wrote the affectionate letter a few weeks after his return to the army we could not expect him to write "my house" or even "our house," but we should expect him to say just what he did write—"your house." The contention that he gave her the property because he did not intend to return to Norristown, is not well founded. He did not mean to desert his wife and child. When he spoke of the uncertainty of his return he referred to the uncertainty of life to one engaging in his country's defence upon the field of battle. That he expected to return to his wife and child, and that very speedily, is evidenced by every line in this letter.

The declarations on the part of the wife are equally indefinite and uncertain; in fact, they are not even ambiguous when we consider the circumstances and surroundings under which they were made. The property was purchased just as the husband was going away. He entered into a service which necessarily kept him away from his wife. He bought the house so the wife should have a home. Quite naturally she would speak of the house as her own, as purchased for her, as given to her. It is not unusual to hear a wife speak of "my house" or "my home" or "my property," without intending thereby to indicate that the husband had no title to the property.

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The declarations of the husband will not be misunderstood when we recall that he directed the deed placed in his own name at the very time he made the declarations. This act is most significant, and entirely inconsistent with the intent to give his wife a fee in the property. Her conduct is equally significant when she purchased the four-hundred-dollar mortgage and held it for nearly twenty years. If she understood the property was her individual estate, why continue to hold a lien against it?

The husband took the title in his own name; the wife, by her act, recognized his title. And these acts should receive more weight than the loose declarations made at the time and now imperfectly recalled by the aged and infirm witnesses.

The claim of title by adverse possession is also unsupported by the facts. The possession taken by Mrs. Murphy and her child was not adverse to the husband, but under and in pursuance of his deed. She took possession not in her own right but in the right of her husband. Her possession was his possession.

Upon the death of the husband her possession was that of the child, the latter living with her. She will not be permitted to claim adversely to the child by the statute of limitations, even when she remarries and the second husband joins in the possession: Cook vs. Nicholas, 2 W. & S., 27. Even where the widow claims the property as her own upon the death of the husband, pays the taxes, takes the income, the neighbors call it her property, and she takes the rents for twenty-one years, the law holds that there is no disseizin of the heirs. "An ouster of the heirs can only be shown by some clear, positive and unequivocal act amounting to an open denial of the right and putting them out of possession. Mere declarations will not answer the purpose": Hall vs. Mathias, 4 W. & S., 331; Iddings vs. Cairns, 2 Grant, 88; Donovan vs. Driscoll, 93 Pa., 513. Mrs. Murphy's possession was not exclusive or adverse to her daughter, for both lived upon the premises and enjoyed its benefits to the time of the death of the daughter at the age of twenty-two years. There was no attempt to show any hostility on the part of the mother to the title of the child, unless the unsatisfactory declarations proven establish such hostility; but, as just shown, mere declarations will not answer to defeat the child's interest in the property. Upon the death of the daughter (the only child of the hus-

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band) a life estate vested in the mother, and her possession from 1884 to 1896 is referable to that interest for life.

The cases of Miller vs. Baker, 160 Pa., 177, and Collins vs. Lynch, 157 Pa., 246, cited by counsel for defendant, have no application to the present controversy. In the first case, the wife purchased the property, paid for it with her money, and by mistake the title was taken in the husband's name. He never had title, and always disclaimed it. The possession was taken by the wife in her own right, and not from any right she claimed through the husband. Again, in the second case, the wife had title by purchase, and made no claim through the husband. She took possession in her own right by purchase from her father. The husband never had any interest or title to the land.

The improvements made by the widow can add little, if anything, to her claim of title by adverse possession. The evidence is silent as to the extent and cost of the back building. The mother had the use and enjoyment of the whole property, and we may well find that the improvement was made with the income belonging to the daughter.

The taxes were paid by the widow; but this fact is of little significance when we remember that there was no settlement of the husband's estate, nor was there any guardian appointed for the daughter to protect her interests. The mother was the only one in a position to pay these taxes. As she had the entire use of the property, it was incumbent upon her to pay the taxes.

Can we enter a conditional order so as to give the defendant the benefit of the four hundred dollars paid in satisfaction of the mortgage?

The widow took an assignment of the mortgage in 1865, and held the claim against the property for nearly twenty years. She then acknowledged satisfaction. Her receipt upon the docket declares that she received full satisfaction for principal and interest. How she obtained satisfaction on her claim does not clearly appear. She was an ignorant woman, unable to write her name, and she may have treated the property as belonging to her daughter subject to her dower interest. Upon the death of the daughter she may have considered the title fully vested in her, and therefore entered satisfaction; or she may have regarded the income of the property for twenty years as full compensation for the money advanced on the

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mortgage in 1865. Whether she was or was not reimbursed for the money expended does not clearly appear. If, however, she had a claim of four hundred dollars against the property, how does the son succeed to this claim? She had no title upon her death to bestow upon the son. He took no interest in the house under her will because she had nothing to give. If she had any claim, it passed to her executor. He must establish his claim against the property as the legal representative of the mother after the true owners have had an opportunity to make their defence. He can not hold the possession of the property as a pledge to enforce payment of a debt. This point was ruled in Gregg vs. Patterson, 9 W. & S., 207, where the court say: "Had Patterson voluntarily paid the whole of the purchase money remaining unpaid upon the contract of Hoops, he, though in possession of the whole land, could not have claimed to hold it to the exclusion of the plaintiffs until he was repaid by them the one-half of what he had paid. He, doubtless, in such case, might recover it by suit, but he would have no right to hold and keep possession of the plaintiffs' moiety of the land as a pledge for the payment of it." Even if the case just cited is weakened by the later rulings, no decision to which our attention was called goes far enough to support the defendant's contention that he may hold the property until he is paid what his mother expended in satisfaction of a mortgage on the property. Where a vendor under articles of sale received part of the purchase money, and the vendee takes possession without a deed, and a third person afterwards secures the possession and pays the balance of the purchase money, the latter may hold possession against the heirs of the vendee until he is repaid his money: Donovan vs. Driscoll, 93 Pa., 509. This follows from the fact that the party in possession stands in the shoes of the vendor, and is entitled to his rights and remedies.

In the case before us the title in John Murphy was complete, and the plaintiffs succeeded to all his rights. The defendant has no title of any kind upon which he can rest his possession.

If it be said that this conclusion destroys a just claim, because in a suit to recover the statute of limitations may be interposed, we answer if the widow paid off the mortgage with her money and satisfied the same under an honest belief that she was the true owner of the property, the satisfaction it would appear may be revoked: Haverford Loan Association vs. Fire Association, 180 Pa., 522.

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Under all the evidence the defendant failed to show any right of possession.

And now, May 27, 1901, if no exceptions are filed to our findings of fact and conclusions of law within thirty days after service of notice of the filing of our decision, the Prothonotary will enter judgment for the plaintiffs for the property described in their writ, with costs of suit.

IN EQUITY.

WILLIAM W. FRAZIER AND CHARLES BAKER VS. THE PENNYPACK TRAP ROCK COMPANY AND JOHN T. DYER.

Where without negligence the necessary blasting in a stone quarry causes shock and vibrations which are injurious to the adjoining properties, the court will not restrain the operations by injunction; but the charges must not be excessive, and the work must be free from negligence.

Where the blasting casts stones upon the public highway, upon the buildings and premises of the plaintiff, dangerous to life and limb, the court will restrain the operations resulting in such trespasses, even if such restraint will deprive defendants from working their quarry at a profit.

FINDINGS and conclusions upon final hearing before the court. No. 1, October T., 1900.

William F. Solly and *Walter M. Shaw, Esqs.*, for plaintiffs.

Louis M. Childs, Esq., for defendants.

Opinion of the court by SWARTZ, P. J., February 1, 1901.

The plaintiffs contend that they are injured by the negligent, reckless and unlawful operation of a stone quarry conducted by the defendant company. The bill filed prays for a decree restraining and enjoining the defendant company, its officers and employes, from carrying on the business of blasting in an improper, unlawful and reckless manner.

FINDINGS OF FACT.

First. The plaintiff William W. Frazier is the owner of a farm in Moreland township, Montgomery county. The premises are more particularly described in the first paragraph of the bill and in Exhibit "A" attached to the bill.

The farm is occupied by the other plaintiff, Charles Baker, who

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is the tenant of Mr. Frazier under a lease. The ownership of Mr. Frazier extends over a period of more than four years, and the tenancy of Mr. Baker began more than two years ago.

Second. The defendant company is the owner of a four-acre tract of land, and occupies the same in connection with a twelve-acre tract held under a lease and option to purchase. The premises so occupied are used in quarrying and crushing stone, and they adjoin the eastern boundary of the plaintiff's farm. The quarry breast is located on the twelve-acre tract, and was operated for some years before the defendant company took possession. The four-acre tract was purchased from the plaintiff Frazier, and is used in part for the improvements which the defendant erected on the grounds. The buildings consist of a crusher-house, blacksmith-shop, barn, and dynamite-house. The company spent nearly twenty thousand dollars in improvements exclusive of the land purchased. When the plaintiff sold the four acres to the defendant company he knew that the land so purchased was to be used in connection with the quarry operations.

The stone taken from the quarry breast are crushed and used as macadam or for other purposes. The capacity of the defendant's plant is about three hundred tons per day.

Third. There is a narrow valley running north and south between the plaintiff's house and the defendant's quarry breast. The Pennypack creek runs south through this valley. On the west bank of the creek is a public highway called Shelmire's Mill road; on the east bank of the creek is located the Philadelphia, Newtown and New York railroad. The hills or bluffs on either side of the valley are very precipitous. A straight line drawn from the quarry breast to the plaintiff's house will intersect the railroad, creek and public road nearly at right angles.

The quarry is being worked in an easterly direction, away from the creek and against the precipitous bluff which forms the eastern wall of the valley. The quarry breast faces the plaintiff's house, which stands on the western bluff above the public road. The house stands at a higher elevation than the base of the quarry breast. The distance from the face of the quarry to the plaintiff's house is about six hundred feet. The barn stands a little to the north of the dwelling-house, and two old tenant-houses front on the public road at the base of the bluff. It does not appear that these tenant-houses were

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occupied during the time the blasting is complained of. The public road along the creek is used by the plaintiff Baker in going to and from his farm. His children must use it in going to the public school, and it is the highway leading to the railroad station. This road is also used by the general public.

Fourth. The defendant company operates its quarry under the management of John T. Dyer, its president. The work of cleaning up and erecting buildings began as early as February, 1900. Some surface boulders had to be removed, and their hardness, size and long exposure required heavy charges of dynamite. These boulders were broken up by the process known in quarrying as mud capping. This method consists of laying sticks of dynamite on top of the boulder, covering them with a shovel or two of mud, and then exploding the dynamite. Some of these rocks were so large and hard that twenty sticks were used to break them up, and in one instance thirty-five sticks were exploded at one blast. The dynamite used was forty per centum nitro-glycerine. Three sticks of the dynamite used average two pounds in weight. The grade used by the defendant is that usually employed in other quarries, although some use sticks of fifty per centum nitro-glycerine.

Work in the quarry proper began about the middle of June, 1900. Deep holes of twenty feet are drilled horizontally into the breast of the quarry, and the rock is loosened or thrown down by exploding heavy charges in the bottom of these holes. The masses of rock or boulders thus thrown down must be broken up before they can be fed to the crusher, and where the boulders are too large for the sledge-hammer they are demolished by mud capping. Blasts by the horizontal deep holes only take place about once every two or three weeks.

Fifth. From February to July 3, 1900, Harry Kulp was the foreman of the quarry. Complaints were made in June, and also in prior months, by Mr. Edwards, whose farm adjoins that of the plaintiff Frazier, that the blasting was injuring his property and endangering his family. Mr. Kulp was using in the mud capping charges varying from one to twelve sticks. Mr. Dyer instructed him to reduce the charges, but he made no changes in the quantity of the sticks used.

After July other foremen succeeded Mr. Kulp. The plaintiff made complaint of the blasting, and Mr. Dyer ordered the maxi-

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mum charge to be reduced to five sticks in mud capping. This order was given about the beginning of October, but the foreman, Andrew Swanson, continued to use charges varying from one stick to ten sticks; and his use of ten sticks was quite frequent.

In mud capping five or six sticks is not an excessive blast for trap rock, such as is found in defendant's quarry.

Sixth. After complaints were made by the plaintiff Frazier, his tenant or agent, Mr. Hunter, the president of the defendant company, commenced blasting by block holes. This method consists of drilling holes into the masses of detached rock or boulders and placing dynamite in the bottom of the holes so drilled. By this method smaller charges will break up the rock; but the danger from flying spalls is increased, unless the charge is made so small as to become practically ineffectual. Blasting by block holes was not altogether abandoned after the experiments, but is still used to some extent in breaking up the detached rock.

We can not find that the plaintiff or his agent suggested this method, although they did complain of the system first used—mud capping. The manager of the quarry knew from his experience that blasting by block holes was attended with greater danger to those living in the vicinity of the quarry, and this knowledge antedated the complaints made.

Seventh. Mud capping is the cheapest method of reducing the rock for the crusher and the market. The use of block holes increases the expense to such an extent that the macadam can not be sold at the ruling market prices. If the defendant company may not use mud capping, the quarry must run at a loss or must be abandoned for the present.

Mud capping will not cast stones and spalls upon the plaintiff's premises or upon the adjoining highway if the blasts are not excessive and reasonable precautions are taken in preparing the stone or rock upon which the sticks of dynamite are placed. Mud capping, however, even if proper care is exercised, will at times, by the concussion, annoy the residents of the neighborhood.

Eighth. If the stone or rock which is to be broken up is covered with a layer of logs before the dynamite is exploded, all danger from flying stones or spalls is avoided. The time and the labor necessary to provide this precaution will increase the cost of production so materially that the method is not commercially feasible.

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Ninth. The blasting, as conducted up to the day of hearing, was done negligently and carelessly and in entire disregard of the instructions given by Mr. Dyer as to maximum charge to be used.

Tenth. The quarrying operations, as conducted by the defendants, have done injury to the plaintiff William W. Frazier as owner and to the plaintiff Charles Baker as tenant of the farm adjoining the quarry by acts of repeated, continuous and destructive trespasses, consisting of the casting of stones in and upon the premises and upon the buildings erected thereon, especially during the months of August and November; casting stones upon the public highway in front of the plaintiff's dwelling-house, and thereby interfering with the safe access to and from the farm buildings; violent concussions, breaking the window-lights in the dwelling-house; and endangering the safety of the tenant, Mr. Baker, and his family in their work upon the premises and about the buildings from the falling stones thrown by the blasting.

Eleventh. When the plaintiff William W. Frazier sold the four-acre tract to the defendant company, he was informed that the quarry would be operated whether he sold or refused to sell.

Twelfth. The violence and negligence of the blasting are shown by breaking many window-lights at various times in the dwelling-house of Marion Edwards and by casting stones upon his premises, although his farm buildings are eight hundred feet away from the quarry.

CONCLUSIONS OF LAW.

First. The court having found as a fact that the defendants conducted their operations in a careless and negligent manner, resulting in repeated, continuous and destructive trespasses in and upon the property of the plaintiffs, it follows that the plaintiffs are entitled to an injunction restraining the further continuance of such negligent and careless operation of the quarry.

Second. The careless and negligent casting of stones upon the public highway, whereby the plaintiffs' access to and from their property is made inconvenient and dangerous, is an injury special to the plaintiffs as well as a nuisance to the public, and the plaintiffs are entitled to equitable relief against the continuance of such injury.

Third. Mud capping, even if conducted under proper care, will occasion noise and concussion, and thereby give annoyance and inconvenience to the plaintiffs, and may occasionally break a window-

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light; but if the quarry operation can not be carried on without inconveniences of this character, the court may not close the quarry and destroy the defendants' business of taking out the stone.

Fourth. If the defendants in mud capping or by any other method can not stop the casting of stones upon the plaintiffs' premises and buildings or upon the public highway upon which the house fronts, because the precautions to prevent such acts are too expensive to prepare the materials for the market, then the operation as a commercial enterprise must terminate unless additional safeguards are provided. The defendants may not work their quarry in a manner that it becomes a continuous menace to life and limb to those occupying plaintiffs' premises, even if such method is the only one under which the quarry can be worked at a profit. This issue, however, is not raised by the testimony. The defendants and their witnesses show that mud capping will not throw stones as far as the plaintiffs' premises, when conducted carefully under the method that the defendants can and pretend to follow.

Fifth. The bill charges the unlawful, negligent and reckless operation of the quarry. The evidence establishes the fact, and we so found. The plaintiffs, therefore, are entitled to a decree restraining the defendant company, its managers, officers and employes, from continuing the unlawful, negligent and reckless operation of the quarry whereby stones, spalls and debris are cast upon the premises and buildings of the said William W. Frazier and upon the public highway in front of his buildings; and to a decree restraining the said defendant, its managers, officers and employes, from the use of excessive charges of explosives, and from any negligent or careless blasting whereby the buildings of the said plaintiffs are injured from vibrations and concussions produced by the explosions.

REASONS IN SUPPORT OF OUR CONCLUSIONS.

That the men in charge of the blasting disregarded the directions of Mr. Dyer, the president of the defendant company, is shown by the foremen themselves. Mr. Kulp was instructed to reduce the charges, but continued on without making any changes. The foreman Swanson was limited to five sticks of dynamite as a maximum charge, and continued to use ten on numerous occasions. Foreman Kulp used twelve sticks, and on some occasions twenty; and at one blast put off thirty-five sticks on a single boulder. We could

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safely find that these workman used charges which would do the quickest and most effective work, regardless of the number of sticks and without any consideration for the safety and rights of the residents in the immediate vicinity of the quarry.

Stones were thrown upon the plaintiffs' premises upon numerous occasions. The occupants of the dwelling had some narrow escapes from serious injury. Mrs. Duckenbuhler was out upon the lawn at plaintiff's dwelling-house, and a stone weighing about nine pounds fell near her feet, making a hole in the ground. Mrs. Baker and her little child were in the kitchen; a stone came through the window, and the broken glass fell upon the child. Other stones fell upon the kitchen roof, cutting a hole in the roof; at the pump, close to where the hired man was washing; at the step of the house; at the barn, near the entrance to the stables; at the pigeon-house; and in the path to the pump. So frequent were the falls of the stones about the pump that it was abandoned. Some of the stones thrown upon the premises were of such a size that shelter under a roof was no sure protection.

Stones were also cast upon the premises and buildings of Mr. Edwards, located eight hundred or nine hundred feet from the quarry. Here, too, there were several narrow escapes from personal injury.

Stones were thrown upon the public highway from time to time. Mr. Edwards had to straddle two big rocks in the middle of the road to get by them; at other times he removed them from the road-bed.

The violent concussion from the blasting broke out the window-sash at the house of Mr. Frazier, and also at the dwelling of Mr. Edwards. More than one hundred window-lights were broken on the premises of the latter, and about fifty were broken at the dwelling of Mr. Frazier.

Making due allowance for the temptation to exaggerate conditions in a case like this, we are nevertheless convinced that the evidence shows conclusively a serious state of affairs. The property of the plaintiff is being injured, and the occupants of the farm are in constant danger from flying missiles. True, warning is given of the coming blasts; but it may not always be heard, shelter may not be near at hand, and farmers can not be expected to seek shelter five

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or six times a day by leaving the fields or abandoning the public highway.

What kind of blasting occasioned the throwing of stone? All the witnesses testify that the blasting by the deep horizontal holes does no injury. The dynamite is so deeply imbedded in the rock that the explosion has no effect upon the loose stones or spalls on the outer surface of the quarry breast. The foreman Kulp, however, testifies that the small stone he saw upon the Edwards premises was thrown by a big shot in the quarry breast.

It will not do to say that the throwing of stones was due to the experiments with block-hole blasting. If the serious throwing of stones in November was occasioned by block holes, as intimated by foreman Swanson, why was this method used? The bill was filed before November, and the day for experiments to satisfy Mr. Edwards had long passed. If the manager of the quarry knew from past experience in other quarries, as well as by tests made in this particular quarry, that block-hole blasting was unsafe, why was it continued to the very day of the hearing of this case? More especially so, if mud capping, according to the defendants, is the only method that can be used to market the stone, and if, as they say, it is the only safe method to adopt. We think it follows clearly that if the injury is due to block-hole blasting, there is no excuse for continuing that system.

From the fact that the stones are constantly thrown upon the plaintiff's property it follows that it is not the result of blasting the horizontal holes, for these blasts occur only once in two or three weeks.

Much of the stone throwing must be due to mud capping. Stones were cast upon the highway and the plaintiff's farm before block-hole blasting was used at all. If stones are thrown by mud capping, there is no excuse for the act. If any fact is established by defendants' witnesses, it is this—that mud capping will not cast stones as far as the plaintiff's buildings if ordinary care is taken to keep the boulders clear of spalls and shells and no excessive charges are used.

If the stones were thrown as testified to, and the plastered walls and window-sash were injured by shock and concussion as the witnesses declare, then the evidence of the defendants establishes conclusively that these acts were the results of negligent, excessive and

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careless blasting. Counsel for the defendant company, realizing this position of his clients, contends that the witnesses for the plaintiffs are mistaken in their evidence. He claims that the stones picked up and produced in court may have been cast upon the premises by the prior occupants of the quarry, who did not use mud capping. This theory may explain the presence of some of the stones, but does not answer the positive statements of the numerous witnesses who saw the stones fly or fall. The evidence as to flying stones is not confined to the plaintiffs' witnesses; the foremen Kulp and Swanson were fully aware of the fact.

It is also claimed that the concussion from the blasts could not break the window-sash and window-lights eight hundred feet away without breaking the lights in the windows of the buildings at the quarry or without setting off the explosives stored in the dynamite-house at the quarry.

This theory seems plausible, but must give way to the positive evidence of the witnesses who saw the lights broken from the vibrations of the air or shock. Some of the destruction was viewed by the representatives of the defendant company, and its liability for the injuries was recognized by the offer to pay for all loss of this character. Why the lights at the quarry were not broken may be due to the difference in the location of the respective buildings in the valley and on the bluff.

There was no attempt to explain the effect of an explosion in the quarry upon a building standing on a bluff on the opposite side of the valley and at a higher elevation—at least not by any one having a scientific knowledge of air vibrations produced by explosives. If the window-lights at the quarry were protected with closed shutters, it might explain the escape of those windows. Why the dynamite in the storage-house was not exploded seems surprising; but we must remember that dynamite, as the defendants' witnesses declare, is a "queer thing."

It is perhaps needless to cite any law in support of our legal conclusions.

The rental value of the plaintiff's farm was depreciated by the repeated trespasses, dangerous to the occupants and destructive of the property, and these acts were the result of negligence on the part of the defendants or their employes. Where the injury is continuous and remediable at law only by a multiplicity of suits, equity

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will intervene for the protection of the injured party by exercising its restraining powers: Scheetz's Appeal, 35 Pa., 88; Evans vs. Fertilizing Co., 160 Pa., 209. Especially is this true where the injury is the result of continuous negligence, and the wrongs amount to more than mere personal inconveniences. By the thirteenth section of the act of June 16, 1836, chancery jurisdiction is given to prevent and restrain the commission or continuance of acts contrary to law and prejudicial to the interests of the community or the rights of individuals. Under this provision it has been repeatedly and uniformly held that injunction is the appropriate remedy for the prevention of trespasses and nuisances which by reason of the persistency with which they are repeated threaten to become of a permanent character: Walters vs. McElroy, 151 Pa., 549.

Pennsylvania Coal Co. vs. Sanderson, 113 Pa., 126, is not at all in point. In that case the injury was necessary under an operation free from negligence; here there is no particle of evidence that the injury is a necessary consequence if the quarry is operated as it can and ought to be operated to market the product. Our case falls within the ruling of Collins vs. Chartiers Gas Co., 139 Pa., 111, where the injury could have been avoided by reasonable precautions which were not of such a character as to make the mining operations prohibitory. If the defendant company wished to raise the questions decided in the Sanderson case, it should have called witnesses to show that the quarry could not be operated without casting stones upon the plaintiff's premises and buildings, instead of calling experienced quarrymen, who testified that the defendant's method, if properly managed, would not cast stones to the injury of plaintiff.

While the question is not raised under the evidenec, still we may say that we can not assent to the proposition that the defendants may cast stones upon the plaintiff's premises from their quarry if such act be free from negligence and the quarry can not be operated with profit unless such acts are tolerated. Where stones are thrown upon a man's buildings and his lawn, they become a menace to life and limb; and if there is no relief in law, he must abandon his property. This is drifting far away from the doctrine, *sic utere tuo ut alienum non loedas.*

"The rule deducible from the decisions seems to be that where a person lawfully engaged in blasting upon his own land so conducts the work as to cause damages to adjoining property in a way

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in itself unlawful, as where there has been a direct trespass upon the premises injured by casting soil or rocks thereon, the liability of the person causing the injury is absolute, and he may be made to respond in damages irrespective of the question of negligence or want of skill. . . . But, ordinarily, where for the purpose of lawfully making use of or improving land it becomes necessary to resort to blasting as the only practicable method of doing so, the owner will not be liable for consequential damages to neighboring property unless he has failed to exercise due care in the performance of the work": 12 American and English Encyclopedia Law, page 508 (second edition).

This distinction between a technical trespass—that is, a physical invasion of one's property and the injury resulting from air vibrations set in motion by blasting—is noted in Booth vs. Rome Railroad Co., 140 N. Y., 267. The case of Hay vs. Cohoes, 2 N. Y., 159, decided that rocks could not be cast on another's property by blasting without liability for the injury, even where all due care was used. This case was cited with apparent approval in Booth vs. Rome Railroad Co., *supra*, although in the latter the court held that an injury to a house not by a technical trespass but by jarring the ground or by concussion of the atmosphere through blasting without negligence, was *damnum absque injuria*.

Our own case of Hindson vs. Markle, 171 Pa., 138, seems to distinguish in a like manner Coal Co. vs. Sanderson. The court say: "The case of Pennsylvania Coal Co. vs. Sanderson, 113 Pa., 126, is not at all in point. That was the mere flowage of natural water which was discharged by natural and irresistible forces, necessarily developed in the act of mining, prosecuted in a perfectly lawful manner. While the mine water thus discharged polluted the water of the stream in which it necessarily flowed, it *caused no deposit of any foreign substance on the land of the plaintiff, and did not deprive her of its use.*" See also Tiffin vs. McCormack, 34 Ohio St., 638. If the position of counsel should prevail, then it is wrong to keep the defendants out of their quarry so long as they operate the same with care, no matter how much injury they may do to plaintiffs; but when the latter are driven away from their farm, they will suffer the very wrong of which the defendants now complain.

It is no doubt difficult to formulate a general rule regulating the rights of adjacent land-owners in the use of their property.

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In granting an injunction in this case we do not stop the defendant's business. We simply ask the company to carry on the work in a manner it professes the operations can and should be conducted—that is, without casting stones on the plaintiff's premises and buildings or hurling them on the public highway in front of his dwelling. A charge of five or six sticks of dynamite, as a maximum for mud capping, is sufficient, according to the manager's evidence, and the blasts must be kept within that limit. If the explosions of a maximum charge so limited will produce air vibrations, concussions and jarrings of the earth, and thereby annoy the occupants of the farm and at times damage the window-lights of the house, the plaintiffs must submit unless it can be shown that the quarry operations can be conducted without causing such injuries. Care and obedience to the manager's orders will no doubt reduce the evil.

We have in a general way answered the findings of fact and legal conclusions submitted by counsel for plaintiffs. We shall now attempt to answer them more specifically.

The first, second, third, fourth, fifth, ninth, tenth and eleventh submissions of fact are approved and affirmed.

The sixth submission is refused. The use of mud caps is not improper, if the charges are not excessive and proper care is exercised in using the method. If mud capping is not allowed the defendants can not operate their quarry. The detached masses of rock or boulders may be so large as to require a charge of more than six sticks of dynamite to break them up by mud capping. If in such case block holes are necessary, the holes should be logged. Whether this condition is likely to arise the evidence does not disclose.

The seventh submission is refused. It would be the safest method, but its general use would compel the quarry operations to close.

The eighth submission is affirmed, with the qualification already noted as to logging, and with the further qualification that we find that the quarry operations, even if properly conducted, may occasionally break a window-light or lights in the plaintiff's dwelling by the concussions or vibrations of the explosions.

There is no evidence that the block holes used were too shallow, except so far as the throwing of stones and spalls may indicate

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such shallowness; but block-hole blasting will at times throw spalls, even if the holes have a proper depth.

We affirm the first, sixth, seventh and eighth submissions for legal findings.

We affirm the second submission, except as to injuries resulting from vibration and concussion where the acts are necessary and free from negligence. It does not follow that the defendants' acts in breaking window-sash and window-lights may continue, for the evidence indicates that these injuries are the result of negligence and not of necessity.

We affirm the third submission.

We affirm the fourth submission with the qualifications noted in the answer to the second submission.

We affirm the fifth submission with the qualifications noted in the answer to the second submission; but we can not find, under the evidence, that the defendants, in order to operate their quarry, must commit acts of trespass on the plaintiff's property or that the quarry can not be conducted at a profit without committing such acts of trespass. All points relating to careful blasting, free from negligence, are irrelevant. No such issues are raised by the bill or evldence.

And now, February 1, 1901, it is ordered, adjudged and decreed that the Prothonotary enter a decree *nisi* restraining and enjoining the defendants in their quarry operations according to the terms and conditions named in our fifth conclusion of law; and unless exceptions are filed, as provided by the equity rules, he will enter a final decree against the defendants as of course.

Court of Common Pleas of Juniata County.

McCahan vs. Reeder, Executor.

Under the act of March 27, 1854, P. L. 214, a justice of the peace has jurisdiction over a non-resident executor where service has been had upon his resident surety.

The granting of an adjournment or a continuance by a justice of the peace is a matter within his discretion, and not reviewable.

CERTIORARI.

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McCahan vs. Reeder, Executor.

C. B. Crawford, Esq., for plaintiff.

B. F. Burchfield, Esq., for defendant.

Opinion of the court by ATKINSON, P. J., March 26, 1901.

It is admitted in this case that the defendant, Emanuel Reeder, executor, etc., of Martha Reeder, deceased, is a non-resident of the state of Pennsylvania, and, as executor, gave security for the performance of his trust, as required by the act of Assembly approved March 15, 1832, P. L. 139, which requires the Register of Wills to take a bond with two or more sufficient sureties, inhabitants of this commonwealth, before letters testamentary are issued to an executor who is not an inhabitant of this commonwealth.

C. Graham Reeder and Harvey B. Gray, both of whom are residents of Juniata county, among others, became sureties upon the bond of Emanuel Reeder as executor.

Letters testamentary were issued to Emanuel Reeder on April 8, 1898, by the Register of Wills of Juniata county, and he was sworn to execute his trust according to law, and took upon himself the duties of executor.

The plaintiff, desiring to bring an action against the estate of Martha Reeder, deceased, caused a summons to be issued by John W. Hibbs, Esq., a justice of the peace of Juniata county, on February 5, 1900, in which writ the bondsmen of Emanuel Reeder, executor, etc., were named as well as the executor himself; and the constable, to whom the writ was directed, made return that Emanuel Reeder, executor, is not a resident of his bailiwick, but is in a fact a resident of the state of Ohio, and then served the writ, according to law, upon two of the sureties on the bond of Emanuel Reeder, executor, etc., who reside in Juniata county.

A meeting was had before Justice Hibbs on February 12, 1900, at 10 a. m., being the time named in the summons; and after a number of continuances and the examination of witnesses on the part of plaintiff to establish his claim, judgment was finally entered in favor of the plaintiff and against Emanuel Reeder, executor, etc., of Martha Reeder, deceased, for the sum of $175.70, with costs.

On April 6, 1900, a writ of certiorari was sued out by Emanuel Reeder, executor, etc., and service of the writ is acknowledged by Justice Hibbs the same day.

The first exception of the defendant, Emanuel Reeder, executor,

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etc., sets out that the justice had no jurisdiction, both the plaintiff and the executor defendant being non-residents of the state and not within the same at the issuance of the summons.

No law was cited to show that a non-resident plaintiff may not bring a suit against another in our state; and the fact that plaintiff was not a resident of Pennsylvania is, as we view the case, of no importance.

Did the justice acquire jurisdiction over the defendant by the service of a summons on the bondsmen of Emanuel Reeder, executor, etc., who reside in Juniata county, letters testamentary having been issued by the Register of Wills of this county? This raises the important question in the case.

The plaintiff relies upon the act of March 27, 1854, P. L. 214, for authority to bring the executor into court by service of a summons on his bondsmen; and counsel for the executor denies that such authority is to be found in the act cited.

The title of the act is "An act relative to bringing suits by creditors and others against executors, administrators and assignees and other trustees in certain cases, and serving notices and for satisfaction of mortgages, and opening judgments in certain cases."

The statute itself provides that "in all cases where executors, administrators, assignees or other trustees shall not reside within the jurisdiction of the court having control of their accounts, proceedings may be had and suits may be brought against them by creditors and others interested in said estates in the counties where such accounts are to be settled, and process may be served by the proper officers of said counties or their deputies on said executors, administrators, assignees or other trustees beyond the bounds of said counties as if they reside therein, or upon any surety on their official bonds, with like effect as if they resided within the jurisdiction of the courts having control of their accounts."

Although this act has been upon the statute books almost fifty years, it does not appear that there is any judicial decision interpreting it. This is probably because its purpose is very clearly set out in its title, and its language is free from ambiguity. In plain words it states that "process may be served on an executor outside of the county or upon any surety on his official bond with like effect as if the executor resided within the jurisdiction of the court having control of his accounts."

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The service of a summons upon any surety on the official bond is equivalent to a service on the non-resident executor, in legal effect, and makes him as liable to answer in the forum from which the summons was issued as if the executor had been personally served.

The plain words of the statute show this to have been the intention of the Legislature; and where there is no ambiguity there is no need of interpretation.

In City vs. Kalchthaler, 114 Pa., 547, it is held that "it is always unsafe to depart from the literal meaning of words, out of deference to some supposed intent, which would prevent their application to a given subject."

"The courts have no right to narrow the construction of a statute so as to give the words a less comprehensive operation than they clearly import. The maxim is that in the absence of ambiguity no exposition of a statute shall be made which is opposed to the express words": Harrow Co. vs. Rosenberger, 40 L. I., 382.

We therefore hold that, under the statute cited, the service of a summons of the magistrate upon the sureties of the executor residing in Juniata county gave that officer jurisdiction over the executor himself, and for this reason we overrule the first exception.

Second exception."—"There is no law nor act of Assembly in Pennsylvania that warrants the service of summons from a justice of the peace upon the bondsmen of a foreign executor for the purpose of obtaining judgment against said executor for debts of a decedent's estate."

Answer.—It is held in Oaks vs. Robinson, 1 Yeates, 250, that justices of the peace have jurisdiction in suits against executors and administrators.

Emanuel Reeder, executor, etc., of Martha Reeder, deceased, is not a foreign executor. He became subject to the laws of Pennsylvania when he filed his bond, took the oath of office, and assumed the duties of executor. A foreign executor is one who derives his authority from another state or nation. The act of March 27, 1854, P. L. 214, as we have seen, warrants the service of a summons upon him, precisely as was done in this case, for the purpose of obtaining judgment against him; and he, having come into this jurisdiction for the purpose of accepting this trust, should be considered as estopped from denying the jurisdiction in order to escape from the liabilities which he voluntarily assumes. The exception is overruled.

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Third exception.—"The justice erred in not entering a judgment of non-suit when asked for by counsel for C. Graham Reeder aud H. B. Gray, it being evident from the statement of the plaintiff's claim that neither of the said persons served with the summons could be in any manner liable to have judgment entered against him, and Emanuel Reeder being without the justice's jurisdiction and not served with the summons."

Answer.—The plaintiff having appeared, the justice had no right to enter a non-suit. The act of March 20, 1810, Par. 6, 5 Sm., 165, provides that in case the plaintiff does not appear either in person or by agent to substantiate his charge, the justice may then, or at some other day as he may judge reasonable, proceed to give judgment against him by non-suit for the costs and fifty cents per day for the reasonable costs of the defendant for his trouble in attending such suit. Lawyer vs. Walls, 17 Pa., 75, decides that a justice of the peace has no authority to enter judgment of non-suit after an appearance by the plaintiff. The third exception is overruled.

Fourth exception.—"The granting of an adjournment or continuance by the justice was a matter within his discretion, and does not constitute a valid reason for reversing the judgment. It is not reviewable on error": Maffit vs. Rynd, 69 Pa., 380; Tassey vs. Church, 4 W. & S., 141. The fourth exception is overruled.

Fifth exception.—This is a summary of the preceding exceptions with the additional statement that the executor did not have his chance to be heard upon any process served upon him, either actually or by implication of law.

The record shows that the summons was returnable February 12, 1900, and by numerous adjournments was continued until April 9, 1900, a period of nearly two months. Surely this was all the time a man, even if he resided in Ohio, would need to make his defence in a suit before a justice of the peace in Pennsylvania. That plaintiff had a right to sue the executor in a common-law action is decided in Swain vs. Ettling, 32 Pa., 486; and the act of March 27, 1854, before cited, gave the authority to serve him with process and secure jurisdiction over him, as was done in this case. The summons, although not very carefully drawn, was sufficient in substance and gave the sureties such notice of the suit as caused them to appear before the justice at the time and place fixed for the hearing. Their duty was to notify the executor of the fact of the suit and to

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ask for such continuance as would enable them to communicate with him and procure counsel and witnesses to make defence, if there was in fact a defence available. Besides all this, C. Graham Reeder, one of the sureties, was a son of the decedent and a residuary legatee under her will, and was as much interested in taking defence to the action as the executor himself. This surety had ample chance to defend; but instead of defending the estate, he secured counsel for himself, he being in no peril and nothing being claimed from him. The fifth exception is overruled.

Sixth exception.—"The whole proceedings are void as to Emanuel Reeder, executor of Martha Reeder, deceased."

Answer.—We do not think so. The plaintiff had a right to sue the estate of Martha Reeder, deceased, the statute pointing out the method of obtaining service on the executor; and this method was pursued. The proceedings before the justice were not so irregular as to afford just grounds for setting them aside, and ample time was given the executor to make a defence if he had any to make. We can not see that any hardship was imposed upon the estate; the executor was delinquent in not filing an account within the year after his appointment, as he was bound by law to do, and the proceeding was on this account amply justified.

The exceptions are all dismissed and overruled and the judgment is affirmed.

Court of Common Pleas of Monroe County.

St. Matthew's Church vs. Schaffer et al.

Where two unincorporated congregations jointly own and have jointly occupied a church building, and the two congregations have licensed a joint Sunday-school, also an unincorporated association, composed of teachers and members and scholars of the two congregations, to occupy the audience-room of the church, and subsequently the two congregations have united in tearing down the old church and erecting a new church in which accommodations are provided for the Sunday-school in the basement, the members of the Sunday-school have no right to enter upon the lands belonging to the two congregations for the purpose of erecting thereon a separate Sunday-school building, on the ground that they have acquired title by adverse possession.

Bill in equity for an injunction.

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St. Matthew's Church vs. Schaffer et al.

Staples & Erdman, Esqs., for plaintiffs.

Henry J. Kotz and *Strom & Palmer, Esqs.*, for defendants.

Opinion of the court by CRAIG, P. J., May 13, 1901.

This bill is brought to restrain the defendants from entering on the land of the plaintiffs with the purpose of erecting a chapel or Sunday-school building thereon, and from cutting timber thereon for such purpose.

FINDINGS OF FACT.

1. The plaintiffs are an unincorporated religious society, or association, having the title, possession and control of the real estate described in their bill, known as St. Matthew's Church property, and containing about fifteen acres.

2. The plaintiffs have no deed or other written title to the land in question. But the evidence shows that one Abraham Smith, the first settler of Kunkletown, donated the land in question for church purposes about the year 1779. Upon it the first church, a log building, was erected in 1779; and the oldest record belonging to the church bears this title, "Church and Baptismal Record of the United Reformed and Lutheran Congregation, October 27, 1779." In addition to the log church a log school-house was built on the premises about 1783, and this school-house was rebuilt in 1831. Teaching was abandoned in the school-house about 1859, after the common-school law went into effect; and the building itself was destroyed in 1884 or thereabouts. There is a burying-ground on the property which has been used for burial purposes by the two congregations since the founding of the church, and there is some cleared land, used for farming purposes, and a grove of timber, in which picnics are held upon the premises. From the preponderance of evidence we find that the fifteen acres of land donated by Abraham Smith, and the church and school-house thereon erected, and the burying-ground and grove and cleared land, belong to and are in possession of and under the control of the plaintiffs, and constitute the property of St. Matthew's Church, at Kunkletown, Pa.

3. When the church was founded and organized there were no written articles of association. The locality was sparsely settled. The settlers were German, and the services of the church were conducted in German originally; and not until a late period was English introduced at stated periods. Down to 1846 no records seem

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to have been kept; but it does appear that from the beginning the church kept up an organization, and conducted its religious services, and was continually attended by pastors from both congregations. It held confirmation services, and had its treasurers and trustees and elders and deacons. It can not be gainsaid from the evidence, we think, that, down to 1856, the full control and possession of all the church property were in the hands of the church officials regularly elected. That this control and government were of a loose and irregular character at times may be conceded, considering the locality and settlers and times and general lack of education. But the fact nevertheless remains, and, we think, must be held undisputed, that until 1846 the congregations maintained their church or organization, and managed their church property fully and substantially and really.

4. On December 5, 1845, there was a meeting of a lagre number of the members of the two congregations in the school-house on the church property for the purpose of considering the building of a new church edifice, and it was then and there concluded to erect such edifice in the following year, 1846, close to the place where the old church stood. Committees from the congregations were appointed to raise money, and a building committee was named. The building of the church was begun in the month of April, 1846, and the corner-stone was laid May 1, 1846. The old log church building was torn down, and a new stone church was erected in its stead. On the day of the laying of the corner-stone the two congregations adopted written articles for the government of the Union Church. Article 2 declares: "This St. Matthew's Church shall be exclusively for the use of the Reformed and Lutheran congregations. In the future no minister of any other denomination shall be permitted to officiate, either in the church, the school-house belonging to it, or the burying-ground attached to it." Article 7 declares: "The consistory of these congregations shall consist of the following persons: Each congregation shall have two elders, four deacons, two trustees and two treasurers. Each congregation shall elect its own consistory."

These articles of government continued in force until February 24, 1900. It will be noticed that the meeting of the two congregations was in the school-house, at the church, and in Article 2 the school-house is declared to belong to the church. So the burying-

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ground is distinctly named in Article 10 as being in the charge and control of the consistory. Under the articles of government, and under the preponderance of the evidence in this case, it must be concluded and found that St. Matthew's Church, by its regularly appointed officers, had the full control and supervision and possession of the fifteen acres of land, donated for church purposes by Abraham Smith, and of all the buildings and property thereon, from 1779 down to February 24, 1900, and from that time to the date of the bringing of this suit.

5. On February 24, 1900, the articles of government of 1846 were supplanted by a constitution and by-laws regularly adopted. This constitution states that it is the "Constitution of the Reformed and Lutheran Congregations, at Kunkletown, Pa.," worshipping at St. Matthew's Church. And Section 2, Article 3, provides: "The pastors, elders and deacons shall constitute the consistories of these congregations, of which the pastor shall be *ex officio* president, and a secretary and treasurer shall be elected from their own number from time to time, as occasion may require. The majority of the members of both consistories, regularly convened, shall be a quorum for the transaction of business."

And Section 3 of the same article provides: "It shall be the duty of the consistories to provide for the faithful enforcement of discipline, and to transact all the other business of the congregation according to the constitution of the respective denominations; provided, however, that whenever any measure of general interest and importance presents itself, such as the buying and selling of property, the borrowing of money, the erection of buildings, they shall first ascertain the will of the majority of such of the voting members of the congregations as may assemble at a meeting called for the purpose, of which at least two weeks previous notice shall have been given from the pulpit." These are the constitution and by-laws of St. Matthew's Church in force at present, and we so find

6. Under this constitution of 1900 no member of either of the congregations had the power to carry out any measure of general interest and importance, such as the erection of buildings on the property of the church, without first having ascertained the will of the majority of the voting members of the congregations.

7. Considerable testimony was taken touching the use and control of the school-house. How and by whom it was built does

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not clearly appear. We may presume, following the general practice and customs of the early settlers, that it was built by the members of the church on the church property. And while the school was loosely conducted, perhaps, yet it is fair to assume, under all the evidence, that, having been built by the members of the congregation on the church property, it was, like all the rest of the church property, actually under the control and supervision of the church authorities. In 1831 the old school-house was torn down and a new one put up—how and by whom does not appear in the evidence. In the articles of government of the church, adopted in 1848, it appears that the congregations met in the school-house for the church work of the adoption of the articles; and in Section 2 it is declared that the school-house belongs to the church. In 1859 or 1860 the school-house was abandoned for school purposes, because the common-school law had gone into effect; and in 1884 or thereabouts the building itself was destroyed. No one in this litigation alleges any right to set up this school-house again. It was brought out as a fact in the case, and as having some bearing on the control of the church property. From the correspondence of the evidence, we think it must be found that the school-house, in the manner in which it was built and rebuilt on the church property, was the property and under the control of St. Matthew's Church.

8. So, too, from the weight of the evidence, it must be found, we think, that the burying-ground and the grove of timber and the cleared land have been and are the property of the church, and are in the possession and control of the church authorities.

9. After the adoption of the constitution and by-laws, February 24, 1900, the old stone church was torn down by the congregation, in pursuance of a decisive vote of the consistories, and a new church building was commenced at the same place. The basement of the new edifice contains now a large and commodious room for Sunday-school purposes, fully completed. Whether this action was in entire accord with the provisions of the constitution of 1900, can make no difference so far as the decision in this case is concerned. The plaintiffs were the only organized bodies of the church organization, and held the legal title and control of the land and property thereof, and were *de facto* the governing power in possession. The matter to be determined is whether the defendants had the right and power to go upon the church property and erect a Sunday-school chapel

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without the consent of the constituted authorities under the constitution of 1900. The church building is now nearly finished, and a Sunday-school room is provided for and ready for occupancy.

10. In 1860 a joint Sunday school, composed of teachers and members and scholars from the congregations, was formed. The school was held in the body or audience-room of the stone church, and used the church furniture. This Sunday-school was thus continued until the date of the tearing down of the old stone church, when it was temporarily held in the grove of the church property until the weather became too cold. About the year 1895 a Sunday-school chapel was erected about a mile from the church by some of the members of the congregations, and a part of the teachers and scholars of the old Sunday-school then left and began a Sunday-school there. Both Sunday-schools continued their work in their respective places of meeting. The seceding Sunday school is referred to as a fact arising in this case, but will not be given any further consideration, as, in the opinion of the court, it can have nothing to do with the question raised in this case. The Sunday-school room in the basement of the new church edifice is about thirty-five by fifty feet in dimensions, and will seat from three hundred to three hundred and fifty persons. It is well lighted, commodious, and well adapted and arranged for Sunday-school work, and is intended for the Sunday-school which used to have its meetings in the old stone church.

11. About December 3, 1900, the defendants entered on the lands of St. Matthew's Church, and began to break ground and to make an excavation of about thirty-five by fifty feet. They cut timber in the grove, and hauled stone to the premises for the purpose of building a foundation, and erecting thereon a Sunday-school chapel for the Sunday-school which had previously met in the old stone church. This was done without the consent of the consistories of the church, or majority of the voting members of the congregations. The proposed Sunday-school chapel is about one hundred and twenty-eight feet distant from the new church building.

12. The defendants are all members either of the Reformed or Evangelical Lutheran Churches and Congregations of Christ, worshipping in St. Matthew's Church, at Kunkletown, Pa., and were such during the whole of the year 1899, and down to the service of the injunction in this case.

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13. A number of the defendants (how many does not clearly appear) were present on January 31, 1900, and on February 24, 1900, when the new constitution and by-laws of the two congregations, comprising St. Matthew's Church, were read and considered and adopted by ballot by the two church councils. At the same time, to wit, February 24, 1900, it was decided by ballot that the Sunday-school should never be held in the church or audience-room. The vote stood one hundred and sixteen to fifty-eight.

14. All the defendants were members of the unincorporated association composed of the two congregations; and as communicant members were subject to and bound by the constitutions of 1846 and 1900. The evidence fails to show that they had any authority from the association, or its officers, to enter upon the land of the association and dig up the same and prepare to build a Sunday-school chapel thereon; nor had they any permission to cut down any of the timber standing in the grove.

15. The Sunday-school, or the defendants representing it, had no rights or powers in and over the association land and property independent of the association. The Sunday-school was simply an auxiliary or preparatory school for the children of the congregations worshipping at St. Matthew's. The Sunday-school must be held, by the fairly preponderating evidence, to have had simply a license or permission from the congregation and the officers thereof to conduct its work of religious education. It never had any existence until 1860. It was permitted to hold its meetings in the said church room of the old stone church, using the furniture therein, until the church building was torn down in 1900. Its meetings were subsidiary to the regular church services, and held so as not to interfere with them. The doctrinal teachings were subject to the supervision and control of the church congregations and their pastors. The Sunday-school had no independent or joint title in the lands of the church. By its own contention it had no possessory rights outside of the audience-room of the old stone church and in the grove for picnic purposes. The picnics were not begun until about 1875 or 1877. The Sunday-school was the child or creature of the church, and had a permissive license to hold its meetings in the church building and its picnics in the grove, as an aid and preparatory service for the church in the worship of God.

16. The real contention of the defendant seems to be that they

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have a right to hold the Sunday-school in the main or audience-room of the new church building. This the plaintiffs deny, and affirm that a suitable and commodious Sunday-school room has been provided for the Sunday-school in the basement of the building which the defendants may occupy; and that the defendants can not, without the official consent of the church association, build an independent Sunday-school chapel on the ground they have selected.

CONCLUSIONS OF LAW.

From 1779 down to 1860, according to our findings of fact, the unincorporated association of St. Matthew's Church, at Kunkletown, Pa., had the undisputed title and possession of the land donated to it by Abraham Smith. During this time the congregation, composing the religious association, had built a church and school building thereon, and had again rebuilt them. The association maintained a burying-ground on the church land during all this time, cultivated some of the land, and preserved a grove of timber trees. During all this time it kept up its organization, and in 1860 was controlled by the articles of government adopted in 1846; so that in 1860 the association was in full, continuous and undisputed possession, and had the full, continuous and undisputed title to the land and property in dispute, and was governed by the articles of 1846. Sunday-schools are now ordinary and useful adjuncts of Christian churches for instructing and preparing youths in religious worship. The American Sunday-School Union was founded in 1824; and in 1860, following the prevailing custom, a Sunday-school was organized from the congregations of St. Matthew's Church and began its meetings in the audience-room of the church building, and continued them therein until 1900, when the old stone church building was torn down because of decay and for the purpose of erecting a new building on the spot occupied by the church. This new building is about completed; and a Sunday-school room, now completed, is provided for the Sunday-school in the basement. The defendants refused to occupy this Sunday-school because it is located in the basement of the building; and having been refused the audience-room of the new church building for Sunday-school occupation, they commenced to build a separate and independent Sunday-school chapel, claiming they had a right by adverse possession.

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We have found as a fact that the defendants and the Sunday-school had no such right; that they had a mere license or permission to use the audience-room of the old stone church for the school. There is nothing in the evidence to show that the association of St. Matthew's Church intended in 1860, or at any time since, to part with its control and ownership of the old stone church erected on the church land, or that the association ever intended to grant to the defendants or the Sunday-school any estate in the premises, or any independent or irrevocable rights therein, whatever. On the contrary, the association has kept up its organization continuously, and has exercised the full control and supervision and possession of the church land and buildings. The license or permission given to the Sunday school to occupy the audience-room of the old church we hold was a license or permission to occupy during the pleasure of the association; and the association, as owner of the land and the governing power of the church, we hold had the undisputed power and right to put an end to the occupation of the Sunday-school, and at least to tear down the old stone church and provide another room in the new church building for the Sunday-school, whenever the interests of the association required it. The Sunday-school could not usurp the functions of the association. It occupied the audience-room of the old stone church by sufferance. The reason that the "chamber or audience-room, dedicated to public congregational worship, should not be thrown open to thoughtless, giddy, sometimes vicious youth, to deface and soil it," given by Agnew, C. J., in Glass's Appeal, 73 Pa., 46, would be abundant for providing a room in the basement of the new church for the Sunday-school.

Having this view of the rights of the contending parties, from a consideration of the fairly preponderating evidence we do not deem it necessary to enter into an extended examination of the cases cited by the parties litigant. The rights of the plaintiffs being exclusive and supreme in the property of the association, it follows that the action and intended action of the defendants must be held to be contrary to law and equity. The defendants' acts and intended acts were and would be not only a trespass but a continuous trespass and an irreparable damage to the property of the association, and a continuous interference and menace to the harmony, peace and government of the association. Such wrongs and threatened wrongs

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equity will take cognizance of and prevent by the strong arm of a chancellor.

The defendants, however, challenge our jurisdiction in this proceeding. They claim the right of erecting a Sunday-school chapel on the premises by reason of adverse possession by reason of its title thus obtained. In order to do this they must show a possession which must not only be notorious but adverse, hostile and exclusive against the owner, the association, and this claim must be against all persons and in subserviency to none, and as if the land belonged to them: Long vs. Mast, 11 Pa., 189; Read vs. St. Ambrose Church, 137 Pa., 321. The possession must be of such a nature as to give warning to the owner that his right is challenged. It must be visible and notorious. The flag of defiance must be kept flying. There must be that in the condition and appearance of the premises themselves that shows to the world that there is a person in possession. The possession must be such that the owner could, by reasonable attentive observation of the land, discover that some one else was in possession, and so be put on his guard: Trickett on Limitations, 14.

It is not pretended that the defendants ever had adverse possession of the ground they propose to take for the Sunday-school chapel. Whatever rights they had, if they had any, were confined to the audience-room of the old stone church. This could not give them adverse possession of all the land: Hole vs. Rittenhouse, 25 Pa., 491; Bishop vs. Lee, 3 Pa., 213. Nowhere in this case is there any evidence of any clear, positive, unequivocal act amounting to an open denial of the plaintiffs' right to the land, and putting them out of the seizin. Such ouster will not be presumed, but must be proved by decisive acts of a hostile character: Watson vs. Gregg, 10 Watts, 289; Bannon vs. Brandon, 34 Pa., 263.

We have found as a fact that the defendants and the Sunday-school entered the audience-room of the old stone church in subservience to the title of the association; and, if we are correct in this, it legally follows that the statute of limitations does not begin to run in their favor, and to the extent of their occupancy, until the privity existing between them and the association is by some unequivocal act.

Until such act the defendants' possession does not become adverse: Cadwalader vs. Appeal, 81 Pa., 194; Landis's Appeal, 102

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Pa., 468. Hence, having no doubt of the title and possession of the plaintiffs to and of the land in question, and both the litigants being unincorporated societies or associations, and the acts of the defendants, who are members of both the congregations, being subversive of the rights of the association, and contrary to the constitution thereof, we hold that this is not an ejectment bill to enforce rights under a legal title; but the injury complained of in this bill is a perversion of the rights of the association, is continuing in its nature, and involves a series of injurious acts of misuse and damage for which there is no adequate remedy at law: Glass's Appeal, 73 Pa., 39; Read vs. St. Ambrose Church, 137 Pa., 321; Krecker vs. Shirey, 103 Pa., 534.

And now, May 13, 1901, the injunction is continued until the further order of the court. The Prothonotary is directed to file and note the foregoing decision. Twenty days from date of notice of filing is allowed for exceptions. Solicitors concerned are to be notified by the Prothonotary of the filing of this decision and of this order.

Orphans' Court of Montgomery County.

Estate of Rebecca Hoffman, Dec'd.

An adult daughter is entitled to the $300 exemption out of the estate of her deceased mother, who left no husband surviving, where the family relation and residence with the deceased is established.

Bona fide residence and family relationship, and not dependence, is the test of the right of an adult daughter to claim exemption under the act of April 14, 1851.

Rule granted on executors to show cause why personal property should not be set apart.

Freas Styer, Esq., for petitioners.

H. M. Brownback, Esq., contra.

Opinion of the court by Solly, P. J., July 17, 1901.

This case was heard on petition and answer, and from them these facts appear. Rebecca Hoffman died in the borough of Norristown on January 28, 1901, leaving a last will and testament, which

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was duly probated, and letters testamentary were granted by the Register of Wills of this county to Charles B. Ramsey and Frank H. Baker, the executors. The decedent left an estate appraised at three thousand and twenty-six dollars. The decedent was the widow of Samuel Hoffman, and resided at No. 348 East Marshall street, Norristown, in the house devised by her husband to her for life. She left surviving the following children and heirs: Charles B. Ramsey, William Ramsey and Charles Fulton, son of a deceased daughter (these two sons and deceased daughter being children of a former marriage), and Milton Hoffman, David Fretz, son of a deceased daughter, and Emma I. Keel, the petitioner, these latter being the children or issue of the marriage with Samuel Hoffman.

All the children had left the parental roof and established homes of their own long before their mother's death, except Mrs. Keel, who lived with her mother in the Marshall street house from the time of her father's death in 1876 until the decease of her mother. She married J. Thompson Keel in 1880, and all lived together at the same place until his death in 1892. During this period of about twenty-five years, from 1876 to 1901, the family relation between Mrs. Keel and her mother was unbroken. Mrs. Keel was the housekeeper, took charge of the home and managed it, the family first consisting of the mother and the petitioner until marriage, then consisting of the mother, herself and her husband until the death of the latter, and from that time on of the mother and herself. The executors in their answer aver that the mother provided the furniture, coal, etc., and the daughter provided food and like necessaries, but do not deny the existence of the family relationship.

The petitioner is in receipt of an income derived from a fund of about five thousand dollars from her husband's estate, and by the will of her mother receives the dividends on some stock of the Pennsylvania Railroad Company. This appears to be the whole of the estate of the petitioner.

The application here is on the part of an adult daughter of a widowed mother to have three hundred dollars worth of the mother's estate set apart to her under the act of April 14, 1851, P. L. 612.

The act reads as follows: "The widow *or* children *of any decedent* dying within this commonwealth, testate or intestate, may retain either real or personal property belonging to said estate to the value of three hundred dollars, and the same shall not be sold, but

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suffered to remain for the use of the widow and family; and it shall be the duty of the executor or administrator of said decedent to have the said property appraised," etc.

Until Himes's Appeal, 94 Pa., 381, was decided in 1880, the act was regarded as applying only to the estate of a deceased husband or father, and that both the spirit and meaning of the act referred alone to such estate. In King's Appeal, 84 Pa., 345, decided in 1877, Mr. Justice Mercur, in speaking for the Supreme Court, distinctly said the act was not intended to apply to the property of a wife, and its provisions were limited to the property left by the husband or father. But in Himes's Appeal the court distinguished King's Appeal upon the facts of the two cases, and held substantially that where no marital rights of a husband are invoked, and the claimant is a minor child who seeks to have set aside property of the estate of a widow and not of a wife, she is entitled to the benefit of the act. The law is settled, therefore, that the exemption can be claimed by a minor child or children out of the estate or property of a deceased widow and mother. See also Wanger's Appeal, 105 Pa., 347.

The fact that the petitioner is of full age does not of itself deprive her of the benefit of the act. "The act fixes no age or circumstances which shall deprive the children of a right to so claim": Barr's Appeal, 1 Monaghan, 764 (1883).

It is conceded that the family relation had existed between the mother and the petitioner for many years, and existed at the time of the mother's death. Under the decisions, the existence of the family relation at the time of the death of the husband or parent is the foundation of the claim: Henkel's Estate, 13 Sup. Court, 337.

Must the adult child, notwithstanding the existence of the family relation, be dependent upon the mother? Or, in other words, must both family relation and dependency exist?

In this case the petitioner at the time of the death of her mother had the income of a fund of about five thousand dollars. She was not entirely dependent, therefore, upon her mother for maintenance. It is claimed by the executors that as the act was intended as a gratuity to the widow or children of the deceased for their support during the settlement of the estate, the child must also be dependent on the parent for support: Holbe's Estate, 9 C. C. R., 512; Young's Estate, 15 C. C. R., 374; Armstrong's Appeal, 2 Chester, 476; and that the act was not intended to apply to a case like this where the

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value of the estate enjoyed by the petitioner is nearly double the amount of the mother's estate.

In Barr's Appeal, *supra*, the court below, Rockefeller, P. J., in its opinion held that "residence, membership of the family and dependence upon the deceased are the true tests without regard to age"; but the Supreme Court makes no reference to dependency. It says: "The act fixes no age or circumstances which shall deprive the children of a right to claim. Here the appellee always lived with her father, the decedent, as a member of his family. She continued with him after she had arrived at the age of twenty-one years, as she had before. She remained as a child, not as a servant. The language of the act does not bar her claim. The spirit and purpose thereof in providing this sum for the family gives it to her. She fills the requirement of the statute." It is true in that case it appeared the claimant was dependent upon the father for support; but the Supreme Court decided the question upon the broad ground that neither *age nor circumstances* were fixed by the act. In other cases cited by the learned counsel for the executors the evidence was that the claimants were without means of support, living with and dependent upon the father. It was simply decided in those cases that the claimant was entitled to the exemption.

In the case of a widow it has been held that it makes no difference whether she has unlimited means. She is entitled to retain property under the act: Palethorp's Estate, 14 C. C. R., 286; Peeble's Estate, 157 Pa., 605. If the widow is entitled, why not the child? The act says the widow *or* children may retain, etc.

In no one of the cases decided by the Supreme Court in which the interpretation of the act of 1851 has been the question, has there been the slightest expression as to the dependence of the claimant being an important or controlling element. Indeed, in one case, Barr's Appeal, where the lower court laid considerable stress upon the dependence of the claimant, the opinion of the Supreme Court is silent on that matter.

The only reported case in which the main facts are nearly similar to those in this case is Lane's Estate, 6 Dist. Rep., 618, decided in 1897 by Judge Stewart, of Franklin county. In that case the decedent was a retired clergyman, who had been a widower a number of years before his death. He left surviving two daughters, both adults, one married, residing with her husband in their own home, and the other unmarried, residing with her father. At the time of

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his death his household consisted of himself and the unmarried daughter. It further appeared that she had an estate of five thousand dollars or six thousand dollars, derived from her mother, and that the estate of the father, which was free from debt, was bequeathed by his will to his two daughters in equal shares. The unmarried daughter claimed the exemption under the act of 1851. Exceptions were filed to the allowance of the exemption because, first, she was an adult, and second, she had an estate of her own and was not dependent upon her father, although residing with him, and the family relation existing at the time of his death. It was held that the family relation and residence with the testator, and not the dependence of the daughter, was the criterion of her right to the exemption, and the exceptions were dismissed in a clear and convincing opinion.

Among other things Judge Stewart well says: "In no decision of the Supreme Court can there be found a suggestion that, with respect to the right of either widow or child to participate, the law requires any other condition than membership in the family at the time of decedent's death. The effort to introduce any other condition, such as dependence upon the parent, is clearly outside the letter of the law, and as yet without warrant in any authoritative decision. . . . And so, upon what we believe to be reason and authority, we shall hold, until otherwise instructed by the Supreme Court, that where there is no widow the right of the children comprising the family at the time of the death, whether one or more, to the exemption attaches at once, irrespective of any other condition or circumstance."

We adopt his reasoning and conclusions as applicable to this case. The membership of the claimant in the family of the decedent being clearly established, she is entitled to have three hundred dollars worth of the property of the decedent set apart and appraised to her under the provisions of the act of April 14, 1851. It makes no difference that the deceased parent is her mother.

And now, July 17, 1901, the rule is made absolute, and it is ordered and decreed that Charles B. Ramsey and Frank H. Baker, the executors of the last will and testament of Rebecca Hoffman, deceased, cause to be set apart and appraised personal property of the said estate to the value of three hundred dollars, which Emma I. Keel, the adult daughter of the decedent, elects to retain, in conformity with the provisions of the act of April 14, 1851.

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Court of Common Pleas of Schuylkill County.

HENDRICKS VS. SENIOR.

Where a husband gives real estate to his wife for life, and directs that at her death so much thereof as shall then remain unexpended shall go to his "beloved wife's relations, such as she shall see fit to name in her last will and testament," and the widow subsequently marries and devises the land to her second husband, the latter will take as against the heirs of the first husband. In such a case the wife takes a fee; and even if she did not, the heirs of her first husband have no standing to contest the second husband's title.

CASE stated in action of ejectment.

H. B. Graeff, Esq., for plaintiff.

E. A. Beddall and *M. M. Burke, Esqs.*, for defendant.

Opinion of the court by MARR, J., June 10, 1901.

The facts have been agreed upon by the respective parties to this controversy, and both plaintiff and defendant claim title to the land in controversy under Jeremiah Hendricks's will, who died in April, 1897, seized of the premises in fee simple.

The questions which are raised by the case stated submitted to the court arise from the will of Jeremiah Hendricks, which has been duly probated, and reads as follows:

"In the name of God, Amen: I, Jeremiah Hendricks, of the borough of Tamaqua, Schuylkill county, state of Pennsylvania, being in good bodily health and of sound and disposing mind and memory, calling to mind the frailty and uncertainty of life, and being desirous of settling my worldly affairs and directing how the estate with which it has pleased God to bless me, shall be disposed of after my decease, while I have strength and capacity so to do, do make and publish this my last will and testament, hereby revoking and making null and void all other last wills and testaments by me heretofore made. And first, I commend my mortal being to Him who gave it, and body to the earth, to be buried without any funeral pomp and with as little expense as may be. And as to my worldly estate and all the property, real, personal or mixed, of which I shall die seised and possessed, or to which I am entitled at the time of my decease, I devise, bequeath and dispose thereof in the manner following, to wit: Imprimis; My will that all my just debts and

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funeral charges shall be paid by my executrix hereinafter named, out of my estate as soon after my decease as shall be found convenient.

"Item. I give, devise and bequeath to my beloved wife Sarah Hendricks, all the property, consisting of dwelling houses and lots which we now occupy and reside, situated in the borough of Tamaqua, Schuylkill county, Pennsylvania, corner Railroad and Rose streets, together with all my interest in of shares or stock which I hold in the Pennsylvania and North Carolina Gold Mining Company, and all the household furniture and other items not particularly named, to have and to hold the said messuage and appurtenances thereunto belonging, and all the rents, issues and profits thereof, and the said goods and chattels for and during her natural life, and at the death of my said wife Sarah Hendricks, all the property hereby devised and bequeathed to her as aforesaid, or so much thereof as shall then remain unexpended, shall then be divided into two equal parts or shares.

"Item. I give, devise and bequeath to my beloved niece, Cordelia Smith, wife of Morris Smith and daughter of my beloved sister, Sarah Hatch, one share, or the one-half of said estate, remaining immediately after the decease of my said wife, to her own use and benefit absolutely, but in case she shall die before the decease of my wife then her share or one-half of the remaining estate, I give and devise to her children in common, share and share alike.

"Item. And the other share or one-half of the remaining estate, I give, devise and bequeath to my beloved wife's relations, such as she shall see fit to name in her last will and testament.

"Item. And in case my wife as executrix, shall see fit to sell the real estate for the benefit of the estate, I do by these presents, give to my said executrix or her executor or executors, full power and authority to grant, alien, bargain, sell, and convey and assure all the same real estate to any person or persons and their heirs in fee simple by all and every such lawful ways and means in the law as to my executrix or her executor or executors or to her or their general counsel, learned in the law, shall seem fit and necessary.

"Lastly, I do nominate and appoint my said wife, Sarah Hendricks, sole executrix of this my last will and testament."

Sarah Hendricks, the widow, subsequently married one John Kaho, and died testate April 13, 1894, and by her last will and testament devised the real estate in controversy to her husband, John

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Kaho, who subsequently purchased, on the 23d day of December, 1895, from Cordelia A. Smith, the niece of Jeremiah Hendricks and devisee of same, the one-half of the said estate remaining after the death of the said Sarah Hendricks. The said John Kaho, after the death of his wife, Sarah Hendricks, married Lizzie Zechman, and, dying, devised by his last will and testament the property in controversy to his wife, Lizzie Kaho, all of his property, "real, personal and mixed, of what nature or kind soever, and wheresoever the same shall be at the time of my death." The said Lizzie Kaho afterwards by deed, dated April 10, 1899, conveyed the whole of said lot or premises to defendants above named. It is further agreed by the case stated that the plaintiffs named in this case are the heirs and legal representatives of the late Jeremiah Hendricks, deceased, and as such claim the undivided half part of the lot described in the writ of ejectment, and that the defendants claim title as above indicated.

The plaintiffs claim that the will of Jeremiah Hendricks did not vest a fee simple title in his wife, Sarah Hendricks, for the premises in controversy, but that it vested in her only a life estate with power to devise by her last will and testament the land in controversy to her relations; and she, dying, by her last will devised the lot in controversy to her second husband; and that John Kaho, being a husband, was not such a relation as was contemplated by Jeremiah Hendricks as set forth in his last will and testament; and therefore the title under which the defendants claim is void, and that the title to the land necessarily vests in the plaintiffs, who are the only heirs of Jeremiah Hendricks, deceased.

The defendants contend that the widow of the testator, under the authorities, took an estate in fee at least of the undivided one-half of the estate devised; and that if she did not take an estate in fee, yet the testator's will devised it to her (the widow's) relations whom she might designate by her will; and that his relations can not raise the question whether or not her will carried into effect the directions of the testator's will, as it is apparent at least that if the widow did not take an estate in fee in the undivided one-half of the estate devised, and did not by will direct who of her relations under the will were to take the undivided one-half of the estate, yet that the testator's heirs can not successfully raise that question, as the estate belonged to the widow's relations surviving her, and they only can raise the question as to the validity of the devise under her will.

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That Jeremiah Hendricks intended to dispose of all his estate is apparent from the opening words of his will, wherein he manifests full purpose and intention of disposing of the whole of his estate. He says, *inter alia:* "And as to my worldly estate and all the property, real, personal and mixed of which I shall die seised and possessed or to which I shall be entitled at the time of my demise, I devise, bequeath and dispose thereof in the manner following."

The first and chief object of the testator's care and bounty was his widow, to whom he gave and devised his entire estate for and during her natural life, with power to consume the same and sell and dispose of it as his representative as she might see fit.

After her death what remained unexpended was to be divided into two equal parts or shares, one of which he devised to Cordelia Smith, his niece, and the other to his beloved wife's relations, as she shall see fit to name in her last will and testament. His wife dying, not having consumed the estate, the niece, Cordelia Smith, took control of the undivided one-half of the premises described in the writ of ejectment, and subsequently sold the same to John Kaho, whom the widow had married, and who is the devisee under the widow's will of the remaining undivided one-half of the premises, which undivided half is the subject of the present controversy. The questions thus raised are not free of difficulty, as the authorities bearing upon this question are numerous and seem to be disposed of under the language of each will.

In Steiner vs. Kolb, 57 Pa., 123, "Where a devise was to a daughter for her life-time, but immediately after her decease it shall be and belong to all her legal heirs, share and share alike," it was held that the daughter took an estate in fee, and that an estate in fee simple is granted where lands are granted to one and his heirs forever generally and absolutely without limitation or restriction to any particular heir or heirs. In the present case the language is similar to the language in the case cited, with a limitation to the relations of the widow as she may designate in her will, which does not seem to take the present case out of the class of cases above cited.

In Anders vs. Gerhard, 140 Pa., 153, the same doctrine is adhered to and Steiner vs. Kolb, *supra*, is cited. In Snyder vs. Baer, 144 Pa., 278, the will of a childless testator provided: "My beloved wife Anna, shall have and hold the property in Bottstown where I now reside, said Anna to have the sole control of the same, during

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her life-time; and at her discretion the executor shall sell the real estate . . . to the best advantage of his wife with power for her to dispose of the same by bequeath or as she directs," it was held that the widow took an estate in fee, and that the first clause in the will carried a fee. In that case the language of the testator's will is similar to the language of the present will. In both cases the widow was to have the estate during her life-time, with power to direct the executor of each will to dispose of the real estate as the widow might direct, and with a direction to the widow in each case to dispose of the same by will. The language in the present case giving to the widow is much stronger, being "I give, devise and bequeath to my beloved wife," than in the case cited. In the present case the widow has power to consume the whole of the estate and dispose of the one undivided half of what remains unexpended, after her decease, by will; whereas, in the case cited there seems to be no power of consumption, but the widow is directed to dispose of the whole estate by will. In Good vs. Fitchhorn, Ib., 287, a testator gave to his wife his estate as her absolute property, with authority to sell or convey part or all of his estate for her support and maintenance; and with discretion his wife by her last will shall dispose of his estate which was not consumed by her, one-half to his and the other to her brothers and sisters. And it was held that she took an estate in fee. In Grimes vs. Shirk, 169 Pa., 74, a testator directed as follows: "I give and devise to my adopted daughter, Hester, . . . all that certain messuage for and during the term of her natural life; and after her death I give and devise the reversion or remainder of the real estate herein devised to her to her lawful issue, to have and to hold the same in common to them, their heirs and assigns, forever. And in case the said Hester should die without leaving lawful issue, then the aforesaid real estate shall revert to my estate." Many authorities were reviewed by the court below in disposing of the question there raised, and it was held that Hester took an estate in fee simple.

From the authorities cited, and many others which might be cited, does it not seem manifest that the law controlling the provisions of the testator's will gave to his widow an estate in fee of the undivided half of the premises in controversy, and if she had such an estate she could convey or devise it as she thought proper? If this view of the will and the law is correct, then the contention would

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be at an end. Another question raised is, Can the plaintiffs (being the heirs of Jeremiah Hendricks) maintain this action? If the widow did not take an estate in fee, did not her relations take such an interest in the undivided half of the premises in controversy, under the provisions of the testator's will? And if the widow did not designate those of her relations who were to take this interest, but devised it to her second husband (who, for the purpose of this case, may be considered as not a relation in the legal sense of the word), are not they the parties who are injured? It has been frequently held that a just interpretation of a will is to be gathered from what was the intention of the testator. In Urich vs. Merkel, 81 Pa., 332, it is said: "But the intention of a testator, when discovered by an examination of all parts of his will, must govern." In Fox's Appeal, 99 Pa., 382, Chief Justice Sharswood, after reviewing many cases cited, says: "No doubt they were all rightly decided conformably to the intention of the testator in each particular will." In Woelpper's Appeal, 126 Pa., 562, Justice Mitchell says: "In the construction of wills the great general and controlling rule is that the intent of the testator shall prevail, and by his intent is meant his actual intent." In Tyson's Estate, 191 Pa., 218, the last mentioned justice says: "This is but one of the hundred expressions of the cardinal rule in the interpretation of wills to find the testator's intent; and by that is meant his actual, personal, individual intent—not a mere presumptive conventional intent inferred from the use of a set phrase or a familiar form of words."

From these authorities and from the provisions of the will it is apparent that the intention of the testator, as manifested by his will, was that the portion of his estate unconsumed by his wife and remaining after his decease was to be divided into two equal shares or parts, one of which he devised to his niece, Cordelia Smith, and the other he devised to his wife's relations such as she shall see fit to name in her last will and testament. And she not designating (as contended by counsel for plaintiffs) her relations, under the legal acceptation of that word, as devisees in her will, does it follow that the title to this share of the estate vested in the plaintiffs in the case? We can not agree to this contention, and do not think that plaintiffs can complain of the widow's devise. As we view this case, we think the widow took an estate in fee in the undivided one-half of the testator's estate under the operation of the law, and that the plaintiffs,

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being the heirs of Jeremiah Hendricks, are not in a position to contest the title to the lands in controversy.

And now, June 10, 1901, under the conditions of the case stated, judgment is directed to be entered for the defendants for the undivided one-half part of the premises described in the writ of ejectment.

Orphans' Court of Dauphin County.

DECKARD'S ESTATE.

The act of May 17, 1866, P. L. 1096, confers jurisdiction on the Orphans' Court to enforce the payment of a sum charged by recognizance upon the real estate adjudged to an heir; but such remedy is not exclusive: Neel's Appeal, 88 Pa., 94.

In such a proceeding the respondent can not abate what he owes to the petitioner upon the recognizance by a claim which he asserts against him wholly disassociated from the obligation entered into.

CITATION to compel payment of money secured by recognizance.

B. F. Etter and *M. W. Jacobs, Esqs.*, for petitioner.

L. B. Alricks, Esq., for respondent.

Opinion of the court by WEISS, J., April 3, 1901.

On October 12, 1897, certain real estate was adjudged to Israel K. Deckard, a son of the deceased, at the valuation of $1,833.33 made by our inquest, who on the same day entered into a recognizance conditioned to pay the other parties in interest their proportionate shares of the valuation on or before October 12, 1898.

One of those interested is Jacob B. Deckard, also a son of Israel Deckard, deceased, whose share is $349.55, upon which is claimed interest from October 12, 1897. He protested, averring that Israel K. Deckard had not paid either the principal or interest, and prayed the court for a citation upon him to show cause why the same so charged upon the real estate should not be paid.

The respondent made answer that the remedy lies in the Common Pleas, and that the Orphans' Court has no jurisdiction of the subject matter. The answer further sets forth that Jacob B. Deckard, as executor of the will of Israel Deckard, deceased, received

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large sums of money, merchandise and other personal effects belonging to the decedent's estate, and with them, or some of them, carried on the store business—in which the deceased was in his lifetime engaged—for a number of years; that he never properly accounted for the property, and that he thus became indebted to the recognizor in a sum in excess of the distributive share due to him.

Neel's Appeal, 88 Pa., 94, settles the question that under the provisions of the act of May 17, 1866, P. L. 1096, the Orphans' Court has jurisdiction. "The remedy in the Orphans' Court is full and ample under the provisions of the act of 1832, jurisdiction having attached under the act of 1866; but it is not exclusive. If the petitioner chose to pursue this remedy, it was open to him; and he was not bound to sue upon the recognizance. There is nothing in the act of 1866 which excludes a resort to the other remedies preëxisting for the recovery of the sum so charged."

The matters of defence set forth in the answer do not attach to the judgment nor the consideration on which it rests. They arise from alleged misconduct on the part of the petitioner acting in the capacity and relationship of executor of the will of the father; and the conclusion reached is that the respondent can not abate what he owes to petitioner upon the recognizance, by a claim which he asserts against him wholly disassociated from the obligation entered into.

"Unquestionably the recognizance in the Orphans' Court is in the nature of a judgment," says the court in Beatty vs. Smith, 4 Yeates, 102.

In Beatty vs. Bordwell, 91 Pa., 438, it is held that "the mere fact that a person has a debt against his judgment creditor gives no right, against the will of the one holding the judgment, to apply the debt as a payment thereon. . . . In some manner, either at law or in equity, the subject matter of defence must have attached to the judgment or the consideration upon which it rests."

It is accordingly ordered and decreed that Israel K. Deckard, the recognizor, pay unto Jacob B. Deckard the sum of $349.55, which is the distributive share due unto the latter out of the charge, by recognizance, upon the real estate adjudged unto the respondent, with interest thereon from October 12, 1897, within thirty days; and in default of payment that execution may issue for the sum so charged with interest upon the real estate so adjudged.

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Court of Common Pleas of Crawford County.

McCURDY VS. LINESVILLE BOROUGH.

The act of May 24, 1878, P. L 129, provides for damages by any alteration of a street, and applies to changes from the natural or original grade as well as to changes from a previously constructed or established one.

It is the duty and within the powers of the borough authorities to grade the entire street, including that part of it occupied by sidewalks; and the damages inflicted by such work accrue at the time the actual change takes place on the ground.

EXCEPTIONS to report of viewers.

Frank P. Ray, Esq., for plaintiff.

J. J. Henderson and *A. M. Fenner, Esqs.*, for defendant.

Opinion of the court by THOMAS, P. J., January 14, 1901.

The street, concerning the change of grade of which is here in question, was opened many years ago, and the roadway thereof was about the year 1878 graded to or about its present grade.

Plaintiff acquired title to the property in question about ten years ago; and, in the autumn of 1899, the borough authorities graded or cut down that portion of the street in front of her premises now occupied by a sidewalk a considerable distance and to a grade corresponding to the grade of the roadway, or nearly so. It seems that this was the first cutting or grading from the original grade of that part of the street used for the sidewalk, and no sidewalk had been constructed in front of these premises prior to this time. It also appears that no change of grade of the roadway was made at the time.

The proceedings were instituted under the act of May 24, 1878, P. L. 129, and the real question for our determination is as to whether plaintiff is entitled to damages by reason of the grading, or altering the grade, of that portion of the street now occupied by the sidewalk only, which change alone has taken place since her ownership of the property; and also as to whether she has proceeded under the proper act to recover the same.

Upon argument it was contended on the part of the defendant that the act of 1878 did not provide for damages for the "establishment" of a grade, but only for a change of grade; and that if this cutting away for a sidewalk could be treated as a grading at all, it

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was the original establishment of a grade as to that portion of the street.

We think it quite clear that the act of 1878 provides for damages done by any alteration of the street, and applies to changes from the natural or original grade as well as to changes from a previously constructed or established one: Hendricks's Appeal, 103 Pa., 358; Borough of New Brighton vs. United Presbyterian Church, 96 Pa., 331.

It was also urged upon argument that the grade of the traveled portion of the street determines its grade; and that having been established in this case before plaintiff became the owner of the property in question, she can not recover damages for the injury she alleges she suffered by reason of having the side of the street cut to said grade after she became the owner.

It is the duty and within the powers of the borough authorities to grade the entire street, including that part of it occupied by sidewalks: Philadelphia vs. Weaver, 14 Pa. Sup. Ct. Rep., 293; Steelton Borough vs. Booser, 162 Pa., 630.

And the damages inflicted by such work accrue at the time the actual change takes place on the ground: Jones vs. Bangor Borough, 144 Pa., 638; Borough of New Brighton vs. Piersol, 107 Pa., 280.

It might well be that the cutting of the roadway proper inflicted no damages whatever upon the property, but that the cutting down of that portion occupied by the sidewalk did, in which case the right to damages would not arise until the damaging change took place.

It is quite clear that the provisions of the act do not limit damages to the changing of the grades or lines of or to the altering or enlarging of the roadway, but refers to such changes or alterations within the limits of the street: Power vs. Ridgway Borough, 149 Pa., 317; Borough of New Brighton vs. Piersol, 107 Pa., 280.

And now, January 14, 1901, the exceptions in this case are hereby dismissed.

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Court of Quarter Sessions of Northampton County.

Bethlehem Borough Extension.

The record shows a compliance with the statute which requires a petition to be signed by a majority of "freeholders" in adjacent territory to be annexed to a borough when they are described as "land-owners."

Motion to quash ordinance filed and all proceedings for extension of borough limits.

W. E. Doster, Esq., for exceptants.

Geo. R. Booth, Esq., for Bethlehem borough.

Opinion of the court by Scott, J., June 10, 1901.

The borough of Bethlehem purposes to extend its limits under the act of April 3, 1851, and Sup. It adopted an ordinance February 4, 1901, reciting that action was taken upon the petition of "the majority of land-owners of the adjoining and adjacent territory": Sup. April 28, 1899, P. L. 115. The ordinance pursuant to requirement of the statute of June 2, 1871, P. L. 283, Sec. 4, was filed in the office of the Court of Quarter Sessions on February 22d. The present motion challenges the jurisdiction of the borough, because the record shows that the petition was not signed by a majority of "freeholders" within the limits to be annexed.

Where proceedings are entirely statutory, it is generally advisable to follow in pleading the phraseology employed; but this is not essential, if the matter be otherwise sufficiently stated according to its legal effect: Chitty Pl., Vol. 1, 312; Mitchell vs. Welsh, 17 Pa., 339.

The designation of freeholders as petitioners does not imply that they must be such as have an unencumbered estate, and entitled to the privileges of stay of execution or exemption from arrest. It is intended to describe the quantity of interest which the tenant has in the tenement, measured by its duration and extent, according to its technical and common law signification, indicating a permanency of tenure to be affected by the proposed change. A freeholder has either an estate for life or in fee, and a person who has an interest less than this is not a land-owner. The word "land" (Franciscus vs. Reigart, 4 W., 109), when used in a grant, denotes

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a freehold estate: 2 Bla. Com., 18; Shep. Touch., 88, 91, 92; Pond vs. Bergh, 10 Paige Ch. N. Y., 156. So it does in a devise (Rooke vs. Rooke, 2 Vern., 461; Chester vs. Chester, 3 P. Wms., 55; 2 Bouvier's Law Dict., Rawle's Rev., 105); and no minor interest would have passed by its mention until the statute of 1 Victoria Ch., 26, Sec. 26, provided otherwise: Beach on Wills, Sec. 266.

An owner of land is one who has a freehold estate and is embraced within this requirement of the statute

An appeal from the municipal action was taken on March 18, 1901, which was within thirty days from the date a copy of the ordinance was filed in the Quarter Sessions: Act April 6, 1899, P. L. 33.

Specifications in support of it, by way of exception, were not filed until April 1, 1901. But the period of limitation in the statute is solely upon the right of appeal. If that be in time, it must be heard by the court. The extent of it is defined by the objections made, the practice concerning which, in the absence of an act of Assembly or a rule of court requiring them to be stated fortwith, follows the analogy of pleadings after suit brought or a bill of particulars upon a rule.

The exception here relates to a matter of fact, and traverses the recital that a majority of freeholders in the territory to be annexed signed the petition upon which the municipal ordinance was enacted. If desired, reference can be made to an examiner to take the testimony (not to make a report as master) (Wayne Borough, 12 Sup. Ct., 363; Middleton vs. Middleton, 187 Pa., 612); but the expenses so incurred are not taxable as costs: Weckerly's Appeal, 12 Sup. Ct., 372.

Now, June 10, 1901, motion to quash proceedings dismissed and overruled.

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Orphans' Court of Wyoming County.

MYERS' ESTATE.

The only persons interested in partition proceedings are the persons having an interest in the land to be divided

The effect of a decree in partition in the Orphans' Court is to divide what descends to the heirs, not to transfer the title from the decedent to the heirs.

No time is prescribed to elapse after the death of the decedent for the institution of the proceedings to effect partition of his estate.

The existence of liens of debts of the decedent is no obstacle to partition.

PETITION to quash proceedings in partition.

James E. Frear, Esq., for administrator.

C. O. Dorsheimer, Esq., for claimant.

Asa S. Keeler, Esq., contra.

Opinion of the court by DUNHAM, P. J., June 26, 1901.

From the records of the Orphans' Court and the Register of Wills' office we learn that Ruth C. Myers died January 14, 1901, intestate, owning about fifty acres of land in Lemon township, Wyoming county, Pa., leaving six children as her heirs to survive her, all being of age, viz.: Arsella Mahanna, Benjamin Myers, Alfred Myers, Frances Suang, William Myers and David Myers.

On April 8, 1901, Arsella Mahanna, Benjamin Myers, Alfred Myers and Frances Suang presented their petition to the Orphans' Court of Wyoming county, and obtained an order directing Sheriff to hold an inquest of partition.

On May 6, 1901, an inquest was held by the Sheriff and jury, at which time it was found by the jury that the land could not be divided without prejudice to or spoiling the whole, and appraised the same at $500.

On June 17, 1901, this inquest, or the report thereof, was confirmed nisi by the court.

On May 11, 1901 (four days after the inquest of partition was held), letters of administration were granted by the Register of Wills of Wyoming county to Miller Culver upon the estate of Ruth C. Myers, deceased.

On June 20, 1901, Miller Culver, administrator as aforesaid, presents a petition to the Orphans' Court asking the court to sus-

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pend proceedings under the partition proceedings until the estate can be settled and debts paid. On June 20, 1901, James Mahanna also files exceptions to the confirmation of the inquest on the ground that the proceedings in partition were premature, and that he is a creditor of the estate of Ruth C. Myers, deceased, and that by allowing partition proceedings to go on his claim might be prejudiced.

It seems too clear for argument, and we deem it unnecessary to cite authorities, which we could do if thought necessary, that the only persons interested in partition proceedings, or who can be affected thereby, are the persons having an interest in the land to be divided; that it is only the interest of the heirs in the land that is affected by the partition. In other words, as expressed by the Supreme Court, "The effect of a decree in partition in the Orphans' Court is to divide what descends to the heirs, not to transfer the title from the decedent to the heirs." That being the case, neither a creditor of the estate nor the administrator has any interest in the proceedings to file exceptions to the confirmation of the report of inquisition. We do not mean to be understood that courts would never stay proceedings in partition upon application of an administrator or a creditor, but it would have to be a case where the interests of creditors and the estate absolutely require it.

Are the proceedings premature? Trickett, in his Law of Partition in Pennsylvania, p. 38, says: "No time is prescribed to elapse after the death of the decedent for the institution of the proceedings to effect partition of his estate. It may be necessary for the administrator or executor to resort to a sale of the lands, or some of it, for the payment of debts. It is, however, not incumbent on the heirs to wait until it is ascertained whether such sale is going to be requisite. The partition may, therefore, be begun shortly after the ancestor's death." On page 30 he also says: "The existence of liens of debts of the decedent, we shall elsewhere see, is no obstacle to a partition. If the sale is made less than two years after the granting of letters of administration, the administrator may sell the land upon order of court to pay debts. In no event can a creditor be injured by the partition proceedings. Were the heirs, or any of them, requesting a stay of partition proceedings until the debts had been provided for, it would be a very different case." In this case, however, all the heirs, and so all persons interested in the land, are asking that the particular proceeding be allowed to go on, and we will

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not disregard the request of those interested and hear those having no interest in the matter.

Exceptions are therefore dismissed, and report of inquest confirmed, June 26, 1901, and a rule granted upon all persons interested in the estate as heirs to appear in court at Tunkhannock, Pa., on the first day of October term, 1901, (being Monday, October 14, 1901), at two o'clock p. m., to accept or refuse the land at the appraisement or upon bids.

Court of Common Pleas of Montgomery County.

IN EQUITY.

URSINUS COLLEGE VS. BOROUGH OF COLLEGEVILLE AND J. MILTON ZIMMERMAN.

Publication of a copy of the ordinance for ten days immediately after its introduction in council is not required where the ordinance to widen a street is enacted in pursuance of a petition by a majority in number and interest of owners of property abutting on the line of the proposed improvement.

FINDINGS of fact and conclusions of law upon final hearing before the court. No. 5, March T., 1901.

Larzelere, Gibson & Fox, Esqs., for plaintiff.

Geo. W. Zimmerman, Esq., for defendant.

Opinion of the court by SWARTZ, P. J., June 3, 1901.

The borough of Collegeville by ordinance widened Main street to fifty-four feet by adding two feet to each side of the existing street of fifty feet. The widening takes two feet along the frontage of the college.

The plaintiff resists the attempt to occupy the two feet for street purposes upon the ground that the ordinance was illegally passed, because no notice was given for ten days immediately after its introduction and before its enactment. The defendant borough answers that such notice is not required where the ordinance is adopted in pursuance of a petition by a majority in number and interest of the abutting land-owners. And for a further answer the defendants

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say that the plaintiff, one of the petitioners for the widening, is estopped from interfering with the borough in the occupying of the two feet, even if such notice was necessary to enact a valid ordinance.

FINDINGS OF FACT.

1. A petition "of a majority in number and interest of the owners of property abutting on the line" of Main street, duly verified by affidavit, was presented to town council before the ordinance was finally adopted as prayed for. Whether all the petitioners had signed before the ordinance was introduced is doubtful.

2. The ordinance was introduced on the first day of January, 1897, and finally adopted on the fifth day of February following. Notice by publication was duly given after the ordinance was finally adopted, but no copies of the ordinance were published for ten days immediately following its introduction in council.

3. The plaintiff college signed the petition for the proposed widening, and the street was widened in strict compliance with the prayer of the petitioners.

4. On May 17, 1897, the borough passed an ordinance requiring the abutting property-owners on Main street to curb and pave. The college owns land on both sides of the street. Nearly all the property-owners laid their pavements, as required by the ordinances widening the street and pavements. The college laid pavement on the west side of the street as widened, and put down the curb on the east side of the street as fixed by the ordinance; but the strip of two feet on the east side has not been disturbed. Several notices were served on the college authorities to pave along the east front of its property. The first notice was given as early as May 6, 1899.

5. The bill was not filed until May 8, 1901, and the only attack made upon the ordinance widening the street is the allegation that notice for ten consecutive days was not given before the ordinance was finally adopted.

CONCLUSIONS OF LAW.

1. Publication of a copy of the ordinance for ten days immediately after its introduction is not required where the ordinance is enacted in pursuance of a petition by a majority in number and interest of the owners of property abutting on the line of the proposed improvement.

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2. The defendants are entitled to an order dismissing the bill of the plaintiff at its cost.

REASONS IN SUPPORT OF OUR CONCLUSIONS.

The ninth section of the act of May 16, 1891, P. L. 75, authorized every municipality to enact ordinances widening streets upon the application of a majority in number and interest of the abutting property-owners. This act gave councils no power to pass such ordinances without petition by the property owners. The act contemplated assessments for benefits against the abutting owners, and therefore gave the people a voice in determining the necessity for the improvement.

The act of May 22, 1895, P. L. 106, amended the ninth section of the act of 1891 by enabling the municipality to widen a street without petition from the owners, and yet assess the abutting property owner for benefits. This power, however, was to be exercised under certain restrictions. The owners must have notice before the ordinance can be enacted, and instead of a majority of town council the ordinance must receive the approval of three-fourths of the members before it becomes valid. These restrictions are valuable to the property-owners. The publication of notice gives them an opportunity to remonstrate before the ordinance becomes a law and they are made liable for damages. The necessity for such notice is not apparent where for weeks a spirited canvass is conducted among the abutting property-owners to secure a majority favorable to the proposed improvement. Publication of notice is wholly unnecessary after such majority is secured, for every property-owner is fully informed of the proposed change before the ordinance is introduced, or at least before it is finally enacted.

But it is said that the ninth section of the act of 1891, as amended in 1895, demands such notice and is binding upon the municipality. We can not so read the amendment. The amended section reënacts word for word all that is contained in the original section. The power given to municipalities in 1891 is not abridged by giving additional powers in the same section. There is no intimation that the grant heretofore given is restricted. All the restrictions named in the proviso are wise and proper when applied to the enlarged powers granted to the members of council. If the proviso as to the ten days notice applies to a widening upon the petition of property-

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owners, then all the other restrictions control the proceedings by petition. It would follow that the action of council without petition meets with less restrictions than the action taken in obedience to the demand of the property-owners interested, for the tenth section of the act of 1891 requires notice after the passage of the ordinance to enable the property-owners to contest the fact whether a majority has applied for the improvement. Thus we would have two publications where the proceeding is by petition and but one where it originates without petition.

The restrictions in the amended ninth section are the same, word for word, as those found in the act of May 22, 1895, P. L. 105, where cities are given the power to enact ordinances widening streets without petition from the property-owners; and the court, in Greenfield Avenue, 191 Pa., 290, held that these restrictions were introduced as a substitute for the petition, and that the old proceeding remained without modification.

The plain purpose of the amended ninth section is to enlarge the occasions when the power to widen a street may be exercised. If we read the proviso of the amended section as limiting the power of council only where the proceeding is without petition, we have two modes of procedure, each in its own way carefully protecting the interests of the property-owners. If we apply the proviso to both methods, we construe an act which was intended to give enlarged powers so that it will limit powers already granted.

The act of May 22, 1895, P. L. 105, is numbered 78, and is followed by number 79—the act amending the ninth section of the act of 1891. It is very evident that the amended ninth section was passed to make it clear that boroughs should enjoy the same powers as cities in the widening of streets. Cities still have the power to widen by petition without the restrictions found in the act of May 22, 1895, P. L. 105, or in the proviso of the amended ninth section: Greenfield Avenue, 191 Pa., 294.

This case rules the entire question, for the amended ninth section speaks of "every municipal corporation"—that is, of cities as well as boroughs. If cities may widen by petition without the restrictions in the proviso, as declared in the case just cited, it follows that the same power still rests with boroughs.

The reënactment of the original ninth section of the act of 1891 is followed by a period, and there is no difficulty in reading the

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whole new section so as to restrict the proviso to the new power conferred. The existing grant should not be destroyed unless the plain reading of the amendment necessitates such interpretation.

The right of the college to contest the authority of the borough to occupy the strip of ground two feet wide may well be questioned upon another ground.

The college petitioned the borough to widen the street just as it was in fact widened. The college submitted to the ordinance by paving on the west side and curbing on the east side. For more than three years the college recognized the validity of the ordinance. The improvement along the entire line of the street is now almost completed. Even if the ten days notice was a prerequisite to enact a valid ordinance, how can the college complain of want of notice when the borough simply took the ground which the college demanded should be taken as part of the street?

And now, June 3, 1901, it is ordered, adjudged and decreed that the Prothonotary enter a decree *nisi* dismissing the bill of the plaintiff with costs; and unless exceptions are filed to our findings and conclusions, as required by the equity rules, he will enter a final decree as of course.

Orphans' Court of Fayette County.

Binns' Estate.

Where a non-resident of the state directs that land in the state shall be applied with other assets in paying legacies, and if they refuse to take it, that it shall be sold and the proceeds are to be applied with other assets in paying legacies, there is a conversion, and no collateral tax is due on the land.

Where an appraisement for the collateral tax is filed without notice to the person entitled thereto, objection may be made to the liability for the tax after the time for appeal has passed.

Citation.

A. F. Cooper, Esq., for estate.

J. Q. Van Swearingen, Esq., for Register.

Opinion of the court by Reppert, P. J., July 6, 1901.

Gibson Binns, a citizen and resident of the state of Ohio, died

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Binns' Estate.

at his residence in Belmont county, in said state, May 2, 1897. He died testate, and his will was duly probated in Belmont county on June 14, 1897, and in Fayette county, Pa., July 30, 1897. He appointed his brother, W. H. Binns, a resident of this county, and his nephew, Samuel Cope, executors of his will. Of these, W. H. Binns survives. He died seized of an undivided interest in a valuable tract of land situate in Fayette county, known as the Binns farm, containing about two hundred and sixty acres. As to this real estate, his will directs as follows:

"Item. I direct that my interest in the Binns farm adjoining lands of Louis Cope, David Browneller and others, shall be appraised judiciously and that Louis Cope, he being the elder, shall have it at said appraisement, and if he reject it Elma Binns shall have the same opportunity, and if rejected then it shall be sold to the highest and best bidder." The land was duly appraised by appraisers appointed by this court at No. 8, December term, 1897; and Louis Cope and Elma Binns having declined to take it at the appraisement, the surviving executor was appointed by the court as trustee to sell the same. He sold the land to Elma Binns. The sale was confirmed and a deed executed and delivered.

On October 13, 1897, the Register of Wills of Fayette county appointed a collateral inheritance tax appraiser, who appraised the decedent's interest in the land at $11,625, which appraisement was duly recorded. Notice of this appraisement was accepted in blank by the surviving executor at the time the appraiser was appointed, with the understanding, as the executor alleges, and the allegation is not denied, that said appraisement was not to completed or filed without further notice to him, as he was not satisfied that the estate was subject to the tax, and he desired opportunity for inquiry. Without further notice to him or knowledge on his part, the appraisement was filed, of which he did not learn until more than thirty days thereafter, and after the time for appeal had expired. No notice of any kind was given to any one else. The executor and the parties interested, believing that the estate was not subject to tax, refused to pay it, and endeavored to have the commonwealth either satisfy the record or proceed to enforce the collection of the tax. This not being done, on March 5, 1901, the executor obtained a rule on the commonwealth, to be served on the Register of Wills of Fayette county, to show cause why the tax assessed against the land should

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not be marked satisfied and the assessment be decreed null and void and stricken from the record. To this the Register made answer that no appeal having been taken, the appraisement and the liability of the estate for the tax became final and conclusive, and denying the authority of the court to satisfy the assessment or strike it from the record.

On May 2, 1901, the court made an order discharging the rule, but directing that a citation issue, directed to the executor and to the heirs and devisees of the deceased, to appear and show cause why the tax should not be paid. They appeared and made answer denying liability.

Does the will of Gibson Binns work a conversion of this real estate? If so, he being a resident of another state, neither the land nor its proceeds is subject to tax. There is no devise of the land. Louis Cope and Elma Binns take no title under the will—only a privilege to purchase at a valuation to be fixed by appraisers. If either had taken the land at the appraisement, he or she would have taken as a purchaser and not as a devisee. No distinction is made of the proceeds, whether realized from a sale under the appraisement clause or to the highest bidder. In either case, with other proceeds of the estate, they go generally to the payment of numerous bequests and to the residuary legatees; and while bequests are made to Elma Binns and Louis Cope, amongst many others, and they are named with several others as residuary legatees, the portions payable to them are not even made payable out of the proceeds of this land, but generally out of the proceeds of the estate. As a matter of fact, the land was sold to the highest bidder. That this will work a conversion, we think, is supported by the following authorities amongst numerous others: Laird's Appeal, 85 Pa., 339; Jones vs. Caldwell, 97 Pa., 42; Pyle's Appeal, 102 Pa., 317; Miller vs. Commonwealth, 111 Pa., 321.

The assessment having been made, can payment of the tax thereon be refused at this time, no appeal having been taken? This assessment was made under Sec. 12 of the act of May 6, 1887, P. L. 79. This section, so far as fixing the valuation is concerned, takes the place of Sec. 12 of the act of April 10, 1849, P. L 570. The proviso to the latter section reads: "Any person or persons dissatisfied with said appraisement or assessment shall have the right to appeal within thirty days to the Register's court," etc. Under

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that act it was held that the appraisement was conclusive only of the value of the estate and not of its liability to taxation: Stinger vs. Commonwealth, 28 Pa., 422.

The proviso to Sec. 12 of the act of 1887 reads: "Any person or persons not satisfied with said appraisement shall have the right to appeal within thirty days to the Orphans' Court; . . . and upon such appeal said courts shall have jurisdiction to determine all questions of valuation and of the liability of the appraised estate for such tax," etc. By this proviso the law respecting the question of liability as declared in Stinger vs. Commonwealth, was changed: Hadley's Estate, 181 Pa., 339.

But even if this land were subject to tax, it was payable not by the executor of the will but by the devisees or the trustee appointed by the court to make the sale under the will. This trustee was not appointed until after the assessment was made. No party interested, therefore, had notice of the assessment. How could such parties appeal from an assessment of which they had neither knowledge nor notice?

"The statute makes no express provision for notice to them, but it gives them a right of appeal, and it would therefore be proper if not requisite that the court should see that notice and a hearing are given. Without such notice and hearing it is not consistent with the universal principles of law that the parties charged should be affected by the adjudication: Hadley's Estate, 181 Pa., 348.

Under this authority we are of opinion that, no notice of the assessment having been given to the parties interested, this assessment is not conclusive of the liability of the appraised estate for the tax; and the estate not being liable for the tax under the law, its collection can not be enforced.

DECREE.

June 29, 1901, this matter was submitted by counsel. And now, July 6, 1901, after consideration, it is ordered, adjudged and decreed that the appraised estate at No. 17 of 1897, Collateral Inheritance, is not liable for collateral inheritance tax, and that the citation to show cause why the same should not be paid be discharged. It is further ordered that this decree be noted on the margin of the record of said appraisement and assessment at said No. 17 of 1897.

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Court of Common Pleas of Forest County.

MILBERT RANKIN VS. L. HAMMOND AND MANLEY CROSBY.

A court of equity can only compel a defendant who has failed to comply with a valid contract to sell real estate, to convey such title as he has.

In such case the plaintiff may either rescind his contract and sue for damages for breach thereof, or he may file a bill for specific performance; and the court can decree that the defendant shall convey all the title he has, and the bill may be retained for the purpose of assessing damages for the failure to make complete title.

BILL in equity.

Bouton & Gallup and *Parmlee & Lindsey, Esqs.*, for the bill.

Hinckley & Rice, Esqs., contra.

Opinion of the court by LINDSEY, P. J.

This bill was filed by Milbert Rankin against L. Hammond and Manley Crosby to enforce the specific performance of a contract between them, dated September 25, 1895, whereby the said Hammond and Crosby agree to sell to said Rankin, and he agrees to buy, fifty acres of land, more or less, in the northeast corner of tract number 3,182, Jenks township, Forest county, and more particularly described therein, at the price of $8 per acre.

On the trial the written contract was given in evidence and the purchase money shown to have been paid. The contract contains no reservations; but the defendants gave evidence to show that they never owned the oil, gas and mineral rights in said land, and evidence tending to show that the plaintiff knew that fact. Mr. L. Hammond testified as follows: "I told Mr. Rankin that we had not got the oil; that they didn't belong to us." This was on the day the contract was made between the parties. The plaintiff, in reply to a question as to whether Mr. Hammond informed him on that day that he did not own the oil, gas and minerals, replied, "There was nothing mentioned that day." Judge McCray testified that he told the plaintiff prior to that day that the defendants did not own the oil and gas in the land in question. And Manley Crosby, one of the defendants, testified that the plaintiff admitted to him about a month before the trial that he knew the defendants did not own the oil and gas rights in the land. It is, therefore, quite clear that at the time the contract was made the plaintiff knew that the defendants did not own the oil and gas rights in said land.

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It is alleged in the defendants' answer that the reservation of oil, gas and minerals was omitted from the contract by mistake. Both of the defendants were witnesses at the trial, but neither of them testifies that such reservation was omitted by mistake. Mr. Hammond testified to his having informed the plaintiff on the day the contract was made that the defendants did not own the oil and gas rights as above stated. He testified that he and the plaintiff went upon the grounds and measured off or stepped off the boundaries of the land so as to include a certain spring which the plaintiff was so desirous of procuring; that they came back to the store or office of the defendants, and he thinks the contract was drawn at that time. Mr. Crosby testified that the contract was drawn on that day in the afternoon, and within an hour, perhaps, of the time when Mr. Hammond and the plaintiff returned from looking over the land. Neither of the defendants testify that the failure to reserve the mineral rights in the contract was an error or mistake. No explanation is given by either the defendants or the plaintiff on that subject, although it clearly appears by the testimony that the plaintiff knew at the time that the defendants did not own the oil and gas rights.

In the absence of any evidence showing that the failure to make reservation in the contract of the mineral rights was an oversight or mistake, we must treat the written contract signed by the parties as the contract entered into between them.

FINDINGS OF FACTS.

First. The defendants, by written contract, dated September 25, 1895, agreed to convey to the plaintiff the fifty acres of land described in said contract without any reservations or exceptions.

Second. The plaintiff knew at the time the written contract was signed that the defendants were not the owners of the oil and gas rights in the land in controversy.

Third. The defendants made and executed a deed for the fifty acres of land described in the contract, excepting and reserving therefrom all the oil, gas or minerals therein contained, and all rights connected therewith, and delivered the same to the plaintiff in October, 1898, and said deed was retained by the plaintiff until March 16, 1900, when it was returned to the defendants. The defendants, therefore, delivered to the plaintiff in October, 1898, a deed

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for all the interests in the land in controversy which they owned at the time said contract was made or since.

LEGAL CONCLUSIONS.

First. A court of equity can only compel the defendants to convey such title as they have.

Second. The defendants having voluntarily made and executed a deed for all the interests which they owned in the land in controversy and delivered the same to the plaintiff in October, 1898, the plaintiff has received all the relief which a court of equity could give him and all that would give a court of equity jurisdiction. What further rights he had, if any, were not such as would give jurisdiction to a court of equity.

DISCUSSION.

The rights of the vendee in cases where the vendor is unable to perform the entire contract are fully discussed in Erwin vs. Myers, 46 Pa., 96, and the law as declared in that case has been followed in Pennsylvania. Justice Strong, in delivering the opinion of the court, says: "In Story's Equity, page 779, the general rule is also said to be that the purchaser, if he chooses, is entitled to have the contract specifically performed as far as the vendor can perform it, and to have an abatement out of the purchase money, or compensation for any deficiency in the title, quantity, quality, description or other matters touching the estate." And in Morse vs. Elmendorff, 11 Paige, 288, the chancellor went so far as to say that in a case where the vendor never had it in his power to perform at all, when the purchaser had filed his bill in good faith, supposing at the time he instituted his suit specific performance could be decreed, he was not prepared to deny that the court would retain his suit, and award the complainant a compensation in damages.

Had the defendants failed to make any conveyance to plaintiff in carrying out their contract, he might have had his choice between two remedies. He might have rescinded the contract and sued for damages for breach of the covenants contained therein; or he might have filed a bill in equity for the specific performance, and the court could have decreed that the defendants should convey to plaintiff all the title which they had, and the bill could then have been retained for the purpose of assessing damages for any failure of the defend-

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ants to make complete title. But the defendants, two years before this bill was filed, had voluntarily made conveyance to the plaintiff of all the title they had in the land in controversy. The plaintiff, therefore, had no right to invoke the aid of the court of equity to compel the defendants to do what they had already done, and all they could do. While a court of equity, having jurisdiction, could retain it for the purpose of assessing damages for any failure of the defendants to convey what they had covenanted to convey, it could not take jurisdiction for that purpose alone. The plaintiff, after keeping the deed for a year and six months, could not return it to the defendants for the purpose of giving a court of equity jurisdiction and then ask to have the bill retained for the purpose of assessing damages.

The defendants having voluntarily executed a deed for all the title that a court of equity could compel them to convey to plaintiff, and delivered it to him before this suit was brought, we think we have no jurisdiction to retain the bill for the purpose of assessing damages; and the plaintiff will have to seek his damages, if he has any, in an action at law. Furthermore, the plaintiff has not shown any damages. No evidence was given on that subject.

The defendants' first and second requests for finding of facts are refused; the third and fourth are sustained. The first and second requests of defendants for legal conclusions are refused and the third is sustained.

The bill, therefore, is dismissed for want of jurisdiction and for the reason that the plaintiff has shown no right to equitable relief.

Court of Common Pleas of Montgomery County.

IN EQUITY.

TOWNSHIP OF ABINGTON VS. PHILADELPHIA AND READING RAILWAY COMPANY ET AL.

A railroad company will not be enjoined by preliminary injunction from constructing a siding over a country road at grade where the facts disclose that by so doing other grade crossings will be avoided and the public safety and convenience enhanced.

MOTION for preliminary injunction. No. 9, March T., 1901.

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Evans, Holland & Dettra, Esqs., for plaintiff.

James Boyd, and *Chas. Heebner, Esqs.*, for defendants.

Opinion of the court by WEAND, J., June 3, 1901.

This case comes before us on a motion for a preliminary injunction to restrain defendants from constructing a grade crossing over Mount Carmel avenue, a public road in Abington township.

At Glenside station the Northeast Pennsylvania railroad branches off from the North Pennsylvania railroad, and crosses Mount Carmel avenue at grade.

Willow Grove Park is a summer resort located on the line of the Northeast Pennsylvania railroad, and during the time of its opening is visited daily by thousands of persons. During the season additional trains are run over defendants' roads. Trains coming from the north—i. e., from Norristown, Doylestown, Manayunk and other points on the line of or connecting with the North Pennsylvania road, and having for their destination Willow Grove Park or other points on the Northeast Pennsylvania road—are now obliged to run to Glenside or below, and then be switched onto the Northeast Pennsylvania. By this method they first cross a road near the station, claimed by the plaintiffs to be a private road but used generally by the public; then, as claimed by defendants, crossing and recrossing the Willow Grove and Germantown turnpike road, which is extensively traveled; then recrossing the first mentioned road; and then crossing Mount Carmel avenue. In coming down the Northeast Pennsylvania road trains desiring to go north on the North Pennsylvania road make the same number of crossings of these country roads. All these crossings are at grade, and have been used for several years. This makes five grade crossings, according to the defendants' testimony. The plaintiffs contend that it is not necessary to run as far as the turnpike, or at least not usual so to do, and that only three grade crossings occur. Defendants claim that the increasing travel to and from the park demands increased facilities for the safe hauling of their trains, and to that end propose to connect the two steam roads north of Glenside station, thereby making but one grade crossing necessary instead of three or five as at present, and thereby lessening the danger, inconvenience and loss of time caused by backing and switching. The point at which the proposed connecting branch crosses Mount Carmel avenue is about one hundred

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and ninety feet from the crossing over the same avenue by the Northeast Pennsylvania road, and it is claimed by plaintiffs that in this fact consists the great danger because of the position persons traveling by vehicles would be placed if caught in this space with trains at the same time on the siding and on the Northeast Pennsylvania road. It is not denied that the defendants have the right to construct a connecting road, nor is it contended that all grade crossings of country roads should be prohibited; but it is urged that the peculiar features of this case should induce the court, in the interests of public safety, to enjoin this particular crossing in the manner proposed. That the proximity of the two crossings makes the danger greater than one ordinary crossing to a traveler caught between them, with trains on both roads, is evident; but this fact alone will not warrant us in granting a preliminary injunction. Should the danger be so great as to deter the public from using the avenue altogether, a different question might arise. From the evidence before us it is apparent that this connection will only be used to any extent during a few months of the year; and we must assume that the defendants, for their own interests and that of the public, will in some manner warn travelers of approaching trains. A signalman or other safeguard at either or both crossings could easily make the fact known. Here we have presented to us the question as to whether the public safety is not increased by reducing the number of times trains will be required to cross Mount Carmel avenue and other roads, and whether this does not counteract or offset the apprehended danger of being caught between the crossings. By the use of this connection trains using it will be required to slow up in order to cross the tracks of the Northeast and North Pennsylvania roads, and their approach from either direction can easily be seen by a traveler having due regard for his own safety and who will obey the injunction to "stop, look and listen."

The plaintiffs have offered no testimony of civil engineers or of persons accustomed to work of this kind to show how the proposed crossing can be avoided. On the part of the defendants it is shown by their engineers that an overhead crossing is impracticable, and that to depress the public road would increase the danger of crossing the Northeast Pennsylvania road because the ascent would be so steep as to obstruct the view of the railroad.

No evidence has been submitted as to the distance, expense or

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other data in reference to another place of crossing sufficiently distant to avoid the particular danger complained of, and which would also answer the purpose of defendants.

We must assume that the defendants have selected their location with reference to its practicability and safety. They claim that the matter of drainage alone compels this method of crossing if done at this point; that their increasing business and the demands of the public require greater facilities for the transfer of their trains than are now enjoyed; that the safety of their passengers and of those who use the public roads in that vicinity will be greatly promoted; that they have selected the most suitable and available point for that purpose; and that no other kind of crossing is reasonably practicable.

The higher courts have not yet been called upon to define what the law requires in reference to grade crossings of country roads by railroad or electric railway. It would seem impossible now to prohibit established steam roads from crossing public country roads by necessary sidings or connections at grade in consequence of the necessary change of grade of the parent road. It may depend on the danger to be occasioned; and, if so, each case must be judged by its peculiar facts. We are unwilling, with the meagre facts before us, presenting such diverse views as to the effect of the proposed crossing, to prevent by a preliminary injunction what seems to be a necessary work so far as the defendants and those traveling on their road are concerned.

The contention of defendants that we have no jurisdiction to sustain this bill need not now be discussed. We think we have, and the demurrer is overruled.

And now, June 3, 1901, a preliminary injunction is refused.

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TOWNSHIP OF LOWER MERION VS. SPRINGFIELD WATER COMPANY.

The defendant was arrested and taken before a magistrate charged with violating a township ordinance.

The magistrate, instead of imposing a penalty, held the defendant for his appearance at court. The defendant took an appeal under the belief that he had been fined. A case stated was then agreed upon to test the validity of the ordinance. *Held*, that the court had no jurisdiction, as there was no suit pending upon which to base the case stated.

CASE stated. No. 45, December T., 1901.

Rowland Evans, Esq., for plaintiff.

Evans, Holland & Dettra, Esqs., for defendant.

Opinion of the court by WEAND, J., May 16, 1901.

This case came before us under a misapprehension of facts. The case before the magistrate was a criminal proceeding entitled "Commonwealth vs. Enos Hart," commenced by a warrant and arrest. The charge was the violation of a township ordinance. After hearing, the defendant was bound over for his appearance at the next Court of Quarter Sessions.

The counsel for defendant were informed that a penalty of ten dollars for a violation of the ordinance had been imposed, and thereupon presented their petition to a Judge of this court, reciting that fact, and asking for an appeal from the judgment of the magistrate, which appeal was allowed. The magistrate returned his record to the Common Pleas, and counsel on both sides, still ignorant of the true state of the case, agreed upon a case stated to test the right of the township to require from a water company a permit to open, tunnel, etc., the public road; and the case was argued on the supposed state of facts. As no penalty was imposed, the basis of the appeal is gone, as there is nothing to appeal from. The magistrate's return belongs to the Quarter Sessions. There can be no case stated without a pending suit; and parties can not by agreement invoke the aid of the court to interpret a law or question which does not arise in a pending suit. The agreement to change or amend the title of the case does not cure the matter. The appeal was allowed under a misapprehension of the facts, and must be quashed.

And now, May 16, 1901, the appeal is quashed and case stated dismissed for want of jurisdiction.

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IN EQUITY.

TOWNSHIP OF UPPER PROVIDENCE VS. TRAPPE AND LIMERICK ELECTRIC STREET RAILWAY COMPANY.

Where a street railway is chartered to build a continuous road extending through four municipalities and begins within one year the construction of its road-bed in one of the four districts, such work actually done upon the highway is a compliance with the stipulation as to beginning work given to the supervisors of a township, "that said company shall begin its work of construction within one year, and have its road completed and in operation within the period of two years from the date of this grant," although no work was done in the township holding such stipulation within one year from the grant.

FINDINGS and conclusions upon final hearing before the court. No. 6, March T., 1901.

George W. Zimmerman, Esq., for plaintiff.

Larzelere, Gibson & Fox, Esqs., for defendant.

Opinion of the court by SWARTZ, P. J., May 27, 1901.

The plaintiff township asks for a permanent injunction restraining the defendant company from constructing an electric passenger railway upon the public highway running through said township of Upper Providence. The application is based upon the claim that the railway company did not begin the work of construction within the year, as it had agreed to do.

The railway company answers that it began the work within one year; that the revocation of consent is without legal effect; and that it has two years within which to complete the road.

FINDINGS OF FACT.

1. The Trappe and Limerick electric street railway by its charter and extensions was authorized to build a street railway from the dividing line of the boroughs of Collegeville and Trappe to the village of Sanatoga, a distance of over eight miles. The road as located passed through the borough of Trappe, the townships of Upper Providence and Limerick, and extended into the township of Lower Pottsgrove. The consent for the construction was duly secured from all the municipalities and the abutting land-owners. The supervisors of Upper Providence, in their contract giving the consent, provided inter alia as follows: "It is further agreed that said company shall begin its work of construction within one year, and have its road completed and in operation within the period of two years

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from the date of this grant; otherwise, all rights, privileges and immunities hereunder granted and conferred shall cease, determine and be void" The consent was given on the 28th day of April, 1900.

2. On February 1 and 2, 1901, the engineer of the company made the measurements along the whole line to determine as to the quantity of materials required for the construction of the road, and located the places for the switches. In March he made the levels for the excavations and poles. The contract for supplying the rails was made in the middle of January, 1901. The contractor began the delivery on March 10th, when six cars of girder rails arrived at the railroad station. On April 6th nineteen cars of T railing arrived, some at Collegeville, others at Sanatoga station. On the 8th day of April the employes of the company began to haul the material along the line of the proposed railway. The rails, ties and other materials were distributed along the highway, and before the 28th of April, 1901. Whether the workmen who were hauling and distributing the materials from the termini of the proposed railway had actually crossed the boundary line of Upper Providence in their distribution, is not clearly shown.

The defendant company also purchased and obtained title by deed to a tract of land in Collegeville, and entered into contracts for boilers, engines, dynamos and other machinery to build a powerhouse for the proposed road. These transactions were all had prior to April 28, 1901.

3. The borough of Trappe desired to macadamize the highway upon which defendant company had located its railway. The borough authorities required the railway company to excavate for its road-bed at the same time the street was being macadamized. This work of excavation for the highway and railway-bed began the last of March or beginning of April, 1901. The work was all done by the same contractor, each party to pay for its respective work. The excavation for the railway-bed extended eleven inches below the street excavations for the macadam. This work of digging up the street to provide a suitable bed for the ties and rails began at least two or three weeks before the one-year limit expired; but no excavations were made within the township of Upper Providence before April 28, 1901.

4. The term of office of Franklin Showalter expired, and Henry C. Harley was elected to succeed Showalter. The other

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supervisor, A. H. Hallman, who joined with Showalter in giving the consent to the defendant company, was reëlected. Harley was dissatisfied with the contract made by his predecessors in office. He employed counsel and signed a paper declaring the contract of April 28, 1900, void, because the defendant company failed to comply with its terms. This notice was served on the attorney for the street railway company. Mr. Hallman, the other supervisor, took no part in this action. There was no meeting of the supervisors to consider the withdrawal of the consent, and Mr. Hallman says he was not spoken to at all about the proceeding instituted by Mr. Harley.

5. The purpose in filing the bill was not to stop the work of constructing a street railway, but to compel the defendant company to pay damages for the use of the highway. The plaintiff township wants the street railway just where it was located. The bill is presented in the attempt to secure a better bargain than was made by the supervisors on April 28, 1900.

CONCLUSIONS OF LAW.

1. The distribution and location of ties, rails and other materials along the bed of the highway upon which the street railway is to be constructed, followed by the digging up of the highway to the depth of eleven inches to receive the ties and rails, is a beginning of the work of construction. As this was done within one year from the date of the grant, the consent is not determined or void.

2. The excavations upon that part of the highway running through the borough of Trappe was a beginning of the work of construction, although no digging up of the street occurred within the limits of the township of Upper Providence.

REASONS IN SUPPORT OF OUR FINDINGS AND CONCLUSIONS.

That the railway company in good faith started to build its road is clearly proven. It entered into large contracts for materials and had them placed along the line of the road. It expended a large sum of money for land upon which to construct the necessary power-house. The engineer laid out the curves and switches; the materials were ordered to meet the needs of this particular line of construction. The rails must have been adapted for the curves and switches, and many car-loads of material were deposited along the highway. All this was done before April 28, 1901. But if this is not a beginning of the work of construction because the highway

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itself was not disturbed, surely the digging up of the road-bed to place the ties and rails must constitute a beginning of work. The general superintendent of the railway company was interrogated by the court. "You say they did the excavating? Excavations for what?" Answer. "That was excavation of the road to put down the ties and tracks." Q. "Was that begun in March?" A. "Yes. That is included in his contract. There was eleven inches of excavation done for the trolley company outside of the work done for the borough." Q. "But it was before the 28th of April when the work was done?" A. "Yes, sir."

There is practically no contradiction of this evidence. Mr. Harley, when asked, "When did the work of macadamizing in the borough begin?" answered, "Some time in the month of April, as near as I can tell." If the witness is correct that the work did not begin before April, still it had time to progress for four weeks before the 28th of April arrived. It is not necessary, therefore, to decide that the purchase and distribution of the materials constitute a beginning of the work of construction. When the materials are secured and put in place for immediate use on the railway-bed a large part of the undertaking in building a street railway is accomplished. It is the part that usually consumes as much time as the actual digging up of the street and the imbedding of the rails and ties. We are aware that under the mechanics' lien laws the hauling and placing of building materials upon the ground is not a commencement of the building: Parrish & Hazard's Appeal, 83 Pa., 111; but there is a difference between a railway construction and a building operation.

Then, too, in the grant before us the words "to begin the work of construction" differ somewhat from the expression "commencement of the building." This distinction was noted in Pennock vs. Hoover, 4 Rawle, 306, where the court say, "the date of the lien is not the commencing or finishing the work but the time of commencing the building." Any person passing along the highway and observing the workmen hauling the ties, rails, poles and other material and placing the same on the bed of the public road at equidistant spaces, would naturally say that the railroad company began the work of construction. But, as already stated, it is not necessary to hold that this was a beginning of the work, for the evidence

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shows that there was actual digging on the highway to prepare the bed of the railway.

Counsel for plaintiff contends that such excavating, unless done within the township of Upper Providence, is not a compliance with the contract.

The extent of the road was well defined. It was located through four municipalities; the termini were fixed. That part located within any one district did not constitute a road. There was but one road, and not a road for each district or municipality.

No work could be done on any part of the highway between Collegeville and Sanatoga unless the consent of the four municipalities was first obtained: Penna. R. R. vs. Montgomery County R. R., 167 Pa., 62. The grant does not say that the work shall begin in Upper Providence within one year, but the work of constructing the road must begin within one year. Upper Providence is one of the middle districts between the termini of the road. There is no good reason for holding that the company must begin the work in the centre. The usual method is to begin at one end or at both termini and work toward the centre. If work was to commence in Upper Providence township within one year, the supervisors should have exacted such a stipulation in their contract.

There are other questions which arise and stand in plaintiff's way before an injunction can be awarded. We do not propose to pass upon them, because the matters already referred to are, in our judgment, fatal to the bill. May one supervisor, without consultation with the other, employ counsel, institute litigation which may involve the township in costs, and arrest a public improvement which he admits the citizens of the township are anxious to secure?

The grant provides that the work shall begin in one year and be completed in two, otherwise all rights conferred are void. Must the failure to begin and the failure to complete unite before the rights of the company terminate? This was answered in the affirmative in Omnibus R. R. vs. Baldwin, 57 Cal., 160.

We conclude that this after attempt to raise more money from the company is without merit.

And now, May 27, 1901, it is ordered and adjudged that the Prothonotary enter a decree *nisi* in accordance with our findings and conclusions dismissing the bill of the plaintiff with costs; and

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unless exceptions are filed, as required by the equity rules, he will enter a final decree as of course.

A. P. FRITZ VS. CORNELIUS M. MOYER AND MARY A. HALLMAN.

A minor purchased real estate and gave a note with surety for the purchase money. When of full age he rescinded the contract, and the grantor sold the property to a third party. *Held*, that the surety was not liable on the note for the purchase money.

MOTION for judgment for want of a sufficient affidavit of defence. No. 39, March T., 1901.

Evans, Holland & Dettra, Esqs., for plaintiff.

H. M. Brownback, Esq., for defendant.

Opinion of the court by SWARTZ, P. J., May 20, 1901.

The plaintiff brought suit on a promissory note. Defendant, Cornelius M. Moyer, purchased a farm from the plaintiff and gave the note as part payment or down money under a written contract. Mary A. Hallman, the other defendant, joined in the note as surety for Moyer.

The affidavit is made by both defendants, and sets out the following grounds of defence: First, that Moyer was induced to enter into the contract by false and fraudulent representations on the part of the plaintiff; second, that Moyer rescinded the contract as soon as he ascertained the representations made were false and fraudulent; third, that the plaintiff afterwards sold the farm to another person; fourth, that the price obtained at the second sale was about the same as the defendant Moyer agreed to pay; and fifth, that the said Moyer was a minor at the time he entered into the contract of sale.

No copy of the written contract is attached to the affidavit. This absence is explained by the statement of defendants' counsel at the argument that the plaintiff holds in his possession the only paper that was made.

The allegations as to fraudulent representations are not as clearly made out as the law demands; and if this were the only matter offered in defence, we might well find that the affidavit is not sufficient.

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The minority of Moyer is a defence which he alone can plead; it is personal to himself, and will not relieve his surety. But if the plaintiff resold the property after the rescission or disaffirmance of the contract by Moyer there can be no recovery on the note, even against the surety, unless it be to recover the damages which the plaintiff sustained under the original contract. If the plaintiff sold to a third person and collects the purchase money from him, it will not do to allow him to collect it a second time by a suit against the surety.

If Moyer, now that he is of full age, disaffirms the contract, and the farm is still held by the plaintiff, the note is not collectible as purchase money against the surety. "The undertaking of the surety goes to the whole consideration; and by the disaffirmance of the contract the plaintiff gets back his land, and the consideration which upheld the contract is extinguished. It would be a strange doctrine which would give him back his land and allow him to recover from the surety the purchase money also": Brandt on Suretyship, Sec. 128; Baker vs. Kennett, 54 Mo., 82. In Kuns vs. Young, 34 Pa., 60, the contract was enforced against the surety; but the reason given is found in the fact that the minor, after his majority, retained the property without any disaffirmance of the contract. The question of damages is not now before us.

We think there is enough in the affidavit to prevent judgment at this time, even against the surety.

And now, May 20, 1901, the rule for judgment is discharged.

ELIZABETH A. LOGAN VS. JOHN B. LOGAN, JR.

The libel for a divorce must show that the petitioner is a resident of the county where the suit is brought. Where no residence is given the jurisdiction is not apparent on the face of the libel.

LIBEL sur divorce. No. 93, March T., 1901.

A. R. Place, Esq., for plaintiff.

Opinion of the court by SWARTZ, P. J., May 16, 1901.

The libel or petition fails to disclose the residence of the libellant. The evidence taken in support of her allegations of cruel and

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barbarous treatment shows that she left the domicile of her husband and removed to her parents' home, in the city of Philadelphia. This was her residence at the time the libel was filed and at the time her testimony was taken. The husband was served at No. 909 Walnut street, Philadelphia. Whether this was his residence at the time does not appear. At the time of the separation of husband and wife they were domiciled in Warrington township, Bucks county.

The act of March 13, 1815, Sec. 2, provides that the libel shall be exhibited "in the Court of Common Pleas of the proper county where the injured party resides." That this provision is binding upon the libellant was decided by the Supreme Court in Sherwood's Appeal, 17 W. N. C., 338. The petition should set forth the residence of the libellant, so that the jurisdiction may be apparent: Richardson vs. Richardson, 8 Dist. Rep., 242. Even if the domicile of the husband continues the legal domicile of the wife, it can not help her case, for it does not appear anywhere that the husband was a resident of this county when the subpœna was awarded. As the case stands before us, we can not decree a divorce.

COMMONWEALTH OF PENNSYLVANIA EX REL. VS. WILLIAM H. MURPHEY.

Art. 2, Sec. 6, of the State Constitution does not prohibit a member of the Legislature from being appointed clerk to the board of township commissioners, under the act of April 28, 1899, P. L. 104.

APPLICATION for quo warranto. No. 21, October T., 1901.

C. Tyson Kratz, Esq., for plaintiff.

Evans, Holland & Dettra, Esqs., for defendant.

Opinion of the court by WEAND, J., October 7, 1901.

This is an application for a writ of quo warranto directed against William H. Murphey to inquire into his right to act as clerk and as secretary of the board of commissioners of the township of Cheltenham, which township became one of the first class under the act of April 28, 1899, P. L. 104.

The respondent was elected a member of the Legislature from Montgomery county at the general election held in November, 1900,

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for two years, and was duly qualified and is still holding such office. In March, 1901, the commissioners of Cheltenham township elected him as clerk to their board. The record does not inform us as to the term for which he was elected, or whether he is receiving a salary.

Sec. 13 of the act provides that "the board of commissioners shall elect a town clerk, who must be a qualified voter of the township, and not a member of the board. He shall perform all the duties of town clerk, as prescribed by existing laws; he shall also act as secretary of the board; shall be the official keeper of the minutes; and shall generally do and perform such duties as may be prescribed by ordinance of the board. His salary shall be fixed by ordinance."

It is claimed by the relator that Mr. Murphey is disqualified from the position of clerk as aforesaid under Art. 2, Sec. 6, of the State Constitution, which provides: "No Senator or Representative shall, during the time for which he may have been elected, be appointed to any civil office under this commonwealth."

On the part of the respondent it is claimed:

1st. That the position of clerk to the township commissioners is not an "office" within the meaning of the prohibition of the constitution;

2d. That it is not a "civil office under the commonwealth"; and

3d. That the Legislature has not declared the offices to be incompatible under Art. 12, Sec. 2, of the constitution.

The last position has no bearing on the case. Art. 12, Sec. 2, has been decided to apply to offices not already inhibited by the constitution, and only applies so far as the legislative power is concerned to offices not already specially mentioned and is not applicable to Art. 2, Sec. 6: De Turk vs. Com., 129 Pa., 151.

We must, therefore, first inquire whether the position of clerk is an office prohibited.

The act of Assembly under which the township is governed, in Sec. 4 provides what officers are to be elected, and these are commissioners, a township treasurer, a township assessor and a township auditor. They are designated as "officers," and their "official term" is in each case specified.

Although a failure to designate the clerk as one of the officers or the designation of him as such is not conclusive of the question, it is plain that the Legislature did not regard him as more than an

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employe. A failure to fix his term also shows that he was to be elected at the will of the board, and it might be for a day or a year, and his salary might be great or nominal.

High on Receivers, Par. 625, defines an office as "a public station or position to which a portion of the sovereignty of the country, either legislative, judicial or executive, attaches for the time being, and which is exercised for the benefit of the public."

Tiedman on Municipal Corporations, ed. 1894, says: "It sometimes becomes both necessary and important to ascertain what elements are essential to constitute a public officer, and to distinguish official status from that of an agent, employe or contractor. The word 'office' implies a more or less permanent delegation of a portion of governmental power, coupled with legally defined duties and privileges, continuous in their nature, and which upon the death, resignation or removal of the incumbent devolves on his successor."

The thought running through every definition of an officer is that he shall perform some service or owe some duty to the government, state or municipal corporation, and not merely to those who appoint or elect him. His tenure must be defined, fixed and certain, and not arise out of mere contract of employment. The duties of the clerk in this case are merely clerical. He has no executive, legislative or judicial functions to perform. He can be elected for a short or a long term, at the will of the board; and his duties may be changed or enlarged as a condition of his election.

The apparent object of designating him as town clerk was to impose upon him certain duties formerly performed by such officer as to strays, etc.; in other respects the clerical duties are the same as those of any secretary to a board of officers, and the fact that he was not to be elected by the people shows that he was considered a mere employe.

"It is the duty of an officer and the nature of that duty which make him a public officer, and not the extent of his authority; office importing the discretionary exercise of some sovereign function, whether great or small, within the limits prescribed by law": A. & E. Encyclopedia of Law, Vol. 19, 1st ed., 390. The official or unofficial character of a position is not to be determined by its name nor by the presence or absence of an official designation: Ib., 389.

If the act had merely described the person to be elected as a clerk or secretary, he could scarcely under the above authority be

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considered as holding a public office; and we have seen that his mere description as "town clerk," whilst conferring on him merely clerical duties, does not invest him with the title or position of an officer. This clerk is not required to take an oath of office, gives no bond, and can be appointed at the pleasure of the board.

Bouvier's Law Dictionary, Rawle's revision, 541, in defining the term officer says: "It is said to depend upon the greater importance and dignity of the position, the requirement of an oath and perhaps of a bond, and usually upon the tenure: 40 Mich., 673. The distinction between officer and placeman is that the former must take an oath of office; the latter, not: 63 N. C., 199."

It has been urged that even if this case does not come within the letter of the law, that it does come within the reason of the prohibition, and that our power to remove attaches. We are unwilling to exercise so arbitrary a power unless the law commands it. It is common knowledge that members of the Legislature are appointed to various positions which strictly come within the definition of civil offices; and this has been done from time immemorial, as a reading of Justice Tod's opinion in Com. ex rel. vs. Binns, 17 S. & R., 219, will abundantly show.

Believing that the constitutional prohibition was not intended to cover cases where nothing but clerical duties are required under appointment or election to a position non-elective by the people, or owing no duties to the public, we refuse the writ.

FAYETTA KNOX VS. PHILADELPHIA AND READING RAILWAY COMPANY.

In a suit against a railroad company for negligence in causing death, the testimony of a passenger that he did not hear a whistle sounded when opposed by positive testimony of others that it was blown, is simply a scintilla of evidence which is not sufficient to make out a charge of negligence in that respect.

The testimony of a passenger, having no special knowledge of the subject, that during a severe rain storm the train is running at a certain rate of speed, is entitled to no weight when opposed by the positive evidence of the engineer and the schedule of the train.

REASONS for instructions to jury. No. 179, October T., 1900

Larzelere, Gibson & Fox, Esqs., for plaintiff.

James Boyd and *Charles Heebner, Esqs.*, for defendant.

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Knox vs. Railway Co.

Opinion of the court by WEAND, J., September 30, 1901.

On the conclusion of the testimony in this case we directed a verdict for defendant, for the reason that no negligence on its part had been shown.

As no motion for a new trial was made, the court had no opportunity to review the case and spread its reasons upon record. As the lower courts are called upon to decide points of law in the hurry of trial, without time for examination of authorities, it would seem but fair for counsel, before appealing a case, to allow the court an opportunity for review. As this was denied us in this case, we exercise our right at this time to place our opinion upon record confirming our ruling at the trial.

The deceased was killed at a country railroad crossing. He approached the crossing during a rain storm, seated in a carriage and driving one horse. He was struck almost as soon as he entered on the tracks. The accident was witnessed by but one person other than the engineer.

As the defendant company was in the exercise of its rights in running the train, the plaintiff was obliged to show, (1) a case clear of contributory negligence on the part of the deceased; and (2) negligence on the part of the defendant. Upon an accident at a railroad crossing, if there be no evidence of negligence the jury should not be permitted to infer it on the part of the railroad company: Sullivan vs. R. R. Co., 7 At., 177.

It was claimed and endeavored to be shown that the defendant company was negligent in two particulars, viz.: (1) In running at an unusual and dangerous rate of speed; (2) in not giving the customary or proper signals on approaching the crossing.

It must be conceded that, unless the plaintiff's testimony established by competent proof either of these propositions, the direction of the court was proper.

Remembering that the scene of the accident was the crossing of a country road, what is the law as to the rate of speed on the part of a steam railroad? The point was so clearly stated by Mr. Justice Dean in Newhard vs. R. R. Co., 153 Pa., 417, as to require no elaboration on our part. There is no rule of law which defines the rate of speed allowed a passenger train, although, of course, there must in certain cases be limitations. But in this case it was the ordinary running of a passenger train at a rate which, if it amounted to that

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claimed by plaintiff's witness, could not be claimed as unusual. There was not a single fact or circumstance, except the rain, which could by any process of reasoning require the engineer to lessen his speed and depart from his running schedule.

In Childs vs. Penna. R. R. Co., 150 Pa., 73, it was held that "the right of a railroad company to move its trains at such rate as the necessities of its business or the requirements of the public may make necessary, is subject only to such restrictions as may be found necessary in cities and populous towns. . . . The movements of trains must be regulated by the railroad companies in the exercise of a business discretion, and upon consideration of the competition they have to encounter and the necessities of modern business. We do not think a jury may fix the maximum rate of speed at which a train shall be moved in the open country, or that a high rate of speed is negligence *per se*." If the question of speed was not for the jury, then the rate, if not excessively unusual, had no bearing on the case if defendant in other respects did its duty. But there was no competent proof of excessive or improper speed.

The only witness for plaintiff who testifies to speed was a passenger, Mr. Daniel Steinmetz, who testifies, page 5: "After the train left Quakertown that day and on down to Krupp's crossing it was going very rapidly. I could not tell how many miles an hour, because I have no means of measuring that; but I was cognizant of the fact that the train was running very rapidly, from the rapidity with which we were passing objects and the jerking of the train. The train was running very rapidly." On page 16, "Between those times the train was running at the rate of sixty miles an hour." On page 7, "It was raining very hard. It was one of those sudden storms that we have sometimes, that come up very suddenly, and it was raining bucketsful—a very severe storm."

The witness did not show anything which would qualify him to judge of the rate of speed, and he was contradicted by the positive evidence of the engineer. To allow a jury to decide this question upon the evidence before them would lead to the usual result of a verdict against the defendant. To say that a passenger, whose training or experience has not qualified him to judge of speed, can, on a rainy day, as described, for the reasons given by this witness, judge or testify with any degree of accuracy that a train is running at forty-five or sixty miles an hour, is absurd; and when opposed

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to the schedule of the train and the positive evidence of the engineer, ought to have no weight with court or jury. It is not unusual for passenger trains to run rapidly, nor for the train to have a jerky motion when running at moderate speed; nor is sixty miles an hour considered unusual on first-class roads. It was contended that because of the rain the speed should have been reduced. Whether this would have added to the safety of other travelers, or whether it would be good railroading, we are unable to decide; but if increased care was required of the railroad company, it was equally so on the part of the traveler.

The evidence of the witness amounted to no more than a scintilla, and was insufficient to rebut the presumption that the engineer did his duty or to rebut his positive testimony as to speed.

"A mere guess or conjecture respecting the rate of speed was not sufficient to establish it": Smith vs. Railway Co., 187 Pa., 451.

The only witness to show that no whistle was blown or bell rung was again Mr. Steinmetz, who said, page 6, "no whistle before the crossing was reached"—that is, at the regular distance from the crossing; and page 10, "there was no bell rung before approaching the crossing; I did not hear any whistle until the one I spoke of, when the crash occurred. That was a rapid, jerky whistle." He was contradicted by the engineer, fireman, conductor and brakeman. Here again we have the case of a passenger whose attention was not directed to signals, and yet might well say that he heard none. How many in a train do hear the whistle or can with certainty say that none was sounded? In Hauser vs. Central R. R. Co. of New Jersey, 147 Pa., 440, the witness was asked: Q. Did you hear the blowing of the whistle that night of the train? A. No, sir; if it did, I did not hear anything. Q. Did you hear the ringing of the bell? A. No, sir. The court said, "She simply says she did not hear any whistle or bell; and as against the positive affirmative testimony of six witnesses who did hear her, her omission to hear is simply a scintilla of evidence, which is not enough to make out a charge of negligence in that respect." And the case was reversed without a new venire.

If but a scintilla and not sufficient to justify a charge of negligence, why should the court submit it to the jury? In this case we adopted the conclusions given by the Supreme Court, and instructed the jury that both the evidence as to speed and as to signals being

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insufficient to charge defendant with negligence the verdict must be for the defendant.

The plaintiff, however, relies on an expression contained in the opinion of the Supreme Court in Laib vs. Penna. R. R. Co., 180 Pa., 503: "In this connection we may add that it was held in Haverstick vs. Railroad Co., 171 Pa., 101, that the presumption that the trainmen performed their duty when a train approached a grade crossing might be rebutted by the testimony of a single witness for the plaintiff that no whistle was sounded or bell rung." It will be observed that this was an affirmation of what was ruled in the case cited; and on referring to that case we find that what was really ruled was that the presumption might be overcome by the testimony of a single witness for plaintiff, etc., "*if the defendant offers no evidence on the subject.*"

In Daubert vs. R. R. Co., 199 Pa., 345, several witnesses testified as to the fact that no warning of the approach of the train was given; but "they each had a reason, as well as an opportunity, for hearing the signal of the incoming train," etc.

We therefore adhere to our ruling that in neither respect as claimed by plaintiff was there evidence of negligence on the part of the defendant company.

At the conclusion of plaintiff's testimony the defendant moved for a non-suit, which motion was overruled. It was claimed that even if defendant was negligent, the decedent was also guilty of contributory negligence in not stopping immediately before entering on the track. As this question will no doubt be raised on the appeal, it may be proper to make a statement as to the facts. It was claimed by plaintiff that her husband stopped at the best point from which to get a view of the railroad, and that from the point where he did stop until the crossing was reached the view towards the approaching train was obstructed by an embankment and bushes. We recognize the fact that the higher courts have ruled that whether the point at which to stop, look and listen took place was the best place, is a question for the jury; but when plaintiff shows that after leaving that point, one hundred and twenty-five feet distant, until a traveler gets on the track no view of the road can be had, it ought not to be held unreasonable that the traveler should again stop. In this case, having stopped at a point seventy-five or one hundred and

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twenty-five from the crossing, in a heavy rain, with the wagon curtains down and with his view obstructed until he reached the tracks, it might well be said that he was negligent.

In reading the testimony as to the condition of the approach to the railroad, it must be kept in mind that in the direction decedent was going Lansdale was to his right and Bethlehem, from which point the train was coming, to his left. Much, in fact most, of the testimony describes the difficulty of seeing towards Lansdale; but all plaintiff's witnesses admit a better view toward Bethlehem. The only witness to the accident describes the decedent as stopping at a point sixty or seventy-five feet from the crossing. "Then he started his horse and drove pretty fast. *At that moment* I looked up the track and saw the train coming in a hurry. At that moment I heard a whistle and the strike both together." This witness was two hundred feet from the crossing.

Some of the other witnesses for plaintiff fix the stopping point at one hundred and twenty-five feet from the crossing. If this was the best point from which to look, he could have seen as far as the signal-post—five hundred feet distant from the crossing. He then drove rapidly, with curtains down, in a severe rain, and was struck as soon as he got on the tracks. He must have seen the train, for it could not have been beyond the signal post or at least not far from it. If prevented from seeing it by the rain, the duty to proceed cautiously and again stop was the greater; and it almost seems incredible that a man can be within twenty feet of a railroad and not hear an approaching train even although no whistle was sounded or bell rung.

We ruled this case with due regard to the rights and duties of travelers and the railroad, and upon what we conceive to be the rulings of the Supreme Court.

If we were in error in not holding that the deceased was guilty of contributory negligence, our ruling would still be correct even if our reasons assigned would not sustain the verdict.

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Ex Parte vs Sarah Thompson.

In an application to supersede a commission in lunacy the test of restoration is the same as that appliad in determining whether a person was properly adjudged a lunatic, incapable of managing his estate; but the burden is on the petitioner to show the restoration to a sound state of mind.

The proofs of restoration may be heard on depositions without the appointment of a master, provided due notice is given to the committee and next of kin of the taking of the proofs.

Application to supersede commission in lunacy. No. 144, June T., 1894.

F. A. Sobernheimer, Esq., for committee.

Evans, Holland & Dettra, Esqs., for defendant.

Opinion of the court by Swartz, P. J., October 2, 1901.

The petitioner, Sarah Thompson, was adjudged a lunatic by inquisition on June 5, 1894.

She filed her application on February 18, 1901, for an order and decree superseding and determining the proceedings in lunacy. A similar application was made on June 15, 1899. We disposed of that petition on May 29, 1900. In dismissing the application we said, "but we see no reason why her property should not be restored to her if she continues in her present condition for a period long enough to justify the conclusion that she is restored to a sound state of mind."

We were very favorably impressed with the evidence given at the former hearing by the persons who lived in the house where Mrs. Thompson boarded for five months immediately prior to the hearing. During that period there was no evidence showing an unsound state of mind. The depositions now show that the petitioner resided in the same boarding-house for two years. The persons brought in contact with her during that time declare that she is of sound mind. Our attention has not been called to any act, declaration or conduct, since the last hearing, showing insanity. Counsel for the committee in lunacy called our attention to the evidence of some of the witnesses which it is alleged shows mental weakness and a want of capacity to manage her own estate. We shall consider this testimony in our review of the depositions submitted.

The act of 1836 declares that the proceedings in lunacy shall be superseded when the petitioner satisfies the court that he is restored to a sound state of mind. Under our practice the test of re-

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storation is the same as that applied in determining whether a person was properly adjudged a lunatic, incapable of managing his estate: Smith's Lunacy, 12 Pa. Super. Ct., 649. The burden, however, is on the petitioner to show the restoration to a sound state of mind.

Where a party from unsoundness of mind is incapable of managinghis affairs, he is liable to a commission, although not totally incapable of taking care of himself; but mere weakness of mind not an abnormal condition is not a ground for a commission. If there is a capacity to manage, as a result of consecutive reasoning, although the management may not be such as intellectual vigor and skill might approve, the jury would not be justified in finding the party a lunatic under the act of Assembly: Commonwealth vs. Snyder, 59 Pa., 328.

Is the petitioner still a lunatic under this test? She must not be judged by the evidence alone upon which the jury found her insane. If this were the test, no person declared insane could be restored to the control of his estate.

The action and conduct of Mrs. Thompson for more than two years were that of a sane woman. The committee allowed her perfect freedom to make all her contracts touching her personal needs. Without aid from any one she transacted all her business touching her maintenance, dress, and extensive travel in Europe. She selected her own boarding-place, and secured board at the rate of three and one-half dollars per week, whereas the committee was accustomed to pay at the rate of seven dollars per week. She is a devoted church member, and regulated her charities with judgment and discretion.

She joined a tourist party making an extensive trip through the continent. She resisted the many temptations to invest her surplus cash in purchasing the attractive articles which meet the traveler at every stage of his journey. When financial failure on the part of the company conducting the party stranded the travelers, it was found that she, unlike many others, had husbanded her pocket money, and was able to complete her journey without inconvenience to herself. It is not shown that she wasted a dollar of her money during all this period of more than two years. In fact, there is no positive evidence that she, during all her periods of a disordered mind, squandered any part of her estate. That she had ample opportunity to show her inability to direct the expenditure of

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money, is shown by the testimony of her committee. He declares that she always received the money she demanded; that he never questioned her as to the use she wished to make of it. When she started for Europe he gave her as much as seven hundred dollars. This confidence on the part of the committee, and proof that it was not abused, is inconsistent with the allegation that she is incapable to manage her own affairs. Those who met her in her home, in the church; those who met her socially, or had dealings with her, declare that she gave no evidence, by word or act, indicating a disordered mind.

These persons had the best opportunities to qualify themselves to give a reliable judgment as to her sanity. In her trip abroad those brought in contact with her found her an agreeable companion, without any marks or evidence of insanity. Several of the witnesses called by the committee say she was peculiar or eccentric, but they fail to point to any act indicating an unsound mind. They do not think she is insane, but their opportunities to form an opinion were so limited that it is practically valueless. Mere eccentricity or personal peculiarities are not sufficient to establish insanity: Commonwealth vs. Meredith, 14 W. N. C., 188; Commonwealth vs. Haskell, 2 Brewster, 491.

Her family physician and Dr. Umstad, who made a special study of her case by frequent interviews, declare that she is perfectly sane. Dr. Richardson, whose large experience in the treatment of the insane gives added value to his judgment, finds no evidence of insanity in her case. The committee is the only one who made answer to the petition praying for a superseding of the lunacy proceedings. True, the brothers and sisters of Mrs. Thompson testify that she is not competent to manage her estate. Their judgment in nearly every case is based altogether upon her conduct in former years. All save two or three had no interviews with her during the past two years. The two or three who saw her within that period had such limited opportunities to study her case that their opinion as to her present condition is not entitled to much weight. All these witnesses are necessarily influenced in their evidence by their knowledge of Mrs. Thompson when she was brought in contact with them some years ago. While the history of a case should not be entirely

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disregarded in an application to supersede, still if it is to receive a controlling weight the application to supersede must fail in every case.

We recognize that Dr. Chase is an expert upon insanity whose opinion should receive due consideration. It is, however, in conflict with the judgment of Dr. Richardson, who has also had large experience in the treatment of the insane. We can not overlook the fact that the committee secured the attendance of three well known experts to examine Mrs. Thompson and to qualify themselves to give evidence as to her mental condition and to aid the court in solving the issue pending before us. The examination was had in the presence of the three doctors; each had equal opportunities to test the sanity of Mrs. Thompson. Dr. Chase alone appears and testifies that the petitioner is not of sound mind. If the other experts agree with Dr. Chase, it is at least unusual to find that they do not appear to testify in behalf of the committee at whose instance they made the examination and tests.

Dr. Chase finds two circumstances that aid him in finding that the petitioner is still insane. First, she will not admit that she was insane at any time; and secondly, she answered questions that a sane person would have resented. What she did say, as we understand, was that she was nervous, due to the sudden loss of an only child. No one, even when fully restored to sound mind, is over willing to admit insanity in former years. If the condition of mind is called by another term that answers the purpose, we must not be too ready to deduce unfavorable conclusions.

Again, in answering questions that she should have resented we must consider the circumstances in which she was placed at the time. She knew that she was under a severe test to establish her sanity. She also knew that she would be judged largely by the answers she made to the questions put to her. Any woman of ordinary intelligence would conclude that proper questions would be put to her, and that she ought to answer them even if her judgment dictated to her that they were not proper. She would naturally conclude that a refusal to answer questions put to her by so eminent a specialist, would weigh against her. We think she should be judged by her answers rather than by any other standard. Did she answer intelligently, like a sane woman? No fault is found with the substance of her replies.

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She had spells of mental derangement in former years, and the doctor thinks these may recur. The fact remains, however, that she has been free from any such attacks for more than two years, and during that time conducted herself in all respects like a sane woman. Where a person was at one time subject to spells of insanity, there is always a possibility that they may return should the same conditions concur which brought on the attacks. All the members of her immediate family are dead, and no serious bereavement by death may again overtake her. Be this as it may, if the test of restoration to a sound state of mind depends upon the possibility that some time there may be a recurrence of mental trouble, no person who has once given evidence of insanity can again secure control of his property, however capable he may be to manage the same.

The doctor declares that the petitioner is not competent to make a will; and yet he finds that "she knows what her property is, who are her next of kin, and what disposition she wishes to make of her property."

Under the doctor's finding Mrs. Thompson has testamentary capacity, notwithstanding his conclusion, for our Supreme Court gives as one of the tests of testamentary capacity, "was he capable of recollecting the property he was about to bequeath, the manner of distributing it, and the objects of his bounty: Wilson vs. Mitchell, 101 Pa., 495.

In his examination the doctor finds "a simplicity, child-like condition of mind." Even if we accept this finding as an established fact and against all evidence to the contrary, the question may still arise whether this child-like condition of mind is sufficient to take the property out of Mrs. Thompson's hands, especially so in the light of the further finding of fact that she knows all about her property and what to do with it. Mere weakness of mind is not insanity: McElroy's Case, 6 W. & S., 451; Commonwealth vs. Schneider, 59 Pa., 328; Commonwealth vs. Reeves, 140 Pa., 258.

While expert testimony must receive due consideration, we can not in this case overlook the evidence of the disinterested witnesses who were brought in contact with Mrs. Thompson from time to time for a period of two years and over, who sat at the same table with her daily or met her in church from week to week or did work for her, and yet no suspicion of mental weakness entered their minds. Above all, we were most favorably impressed with her management

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and care of the money so freely entrusted to her by the committee, and with the ability manifested in taking care of herself and her affairs whether at home or abroad.

We are aware that judges as well as witnesses are at times deceived in cases of this character where the question of the restoration to soundness of mind must be met and determined, and we shall therefore retain our hold upon the original proceeding in lunacy so that the order suspending the finding of the jury may be revoked should future developments demand such action. We shall follow the course approved in Roberts's Estate, 197 Pa., 621.

The objection to the method of taking the testimony submitted to the court is not well taken. The act of June 13, 1836, provides that the court "shall take proof of the facts." How the proofs are to be taken is not specified. Under our Rules of Court depositions before a notary public are of course, by giving six days notice in writing to the attorney of the opposite party.

And now, October 2, 1901, upon due consideration of the testimony taken under this application, the court is satisfied from the proofs that Sarah Thompson is now in a sound state of mind and competent to transact business and to manage, control and care for her property; and it is ordered that the commission issued in this case, and the inquisition taken thereon, and the appointment of a committee and all proceedings relating thereto, be and the same are hereby suspended until the further order of the court; and from this time, and until such further order, the said petitioner shall have and exercise all the powers, authority, control, rights and privileges that she would be entitled to have and exercise if the inquisition and proceedings hereby suspended had not been had.

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Court of Common Pleas of Washington County.

CRAFT, TRUSTEE OF MORROW, A BANKRUPT, VS. MORROW.

A deed by a bankrupt to his mother, who at the time had no knowledge of the insolvency of her son, in order to give her a recordable title to property by him sold to his mother thirteen years before, and paid for her at or near that time, is not violative of the act of Congress declaring null and void liens and conveyances of a bankrupt created or made within four months of the filing of the petition in bankruptcy to give a preference, etc., although said deed is dated within the said four months.

TRIAL in equity.

R. H. Melloy, Esq., for plaintiff.

McCrackens & Baker, Esqs., for defendant.

Opinion of the court by TAYLOR, J., October 7, 1901.

Nature of suit: Bill for cancellation of deed of conveyance of real estate made by a bankrupt while insolvent and within four months prior to the adjudication in bankruptcy of the grantor, for alleged preference and in fraud of creditors.

FACTS FOUND.

The court finds:

1. That the defendant, Barbara Morrow, is the widow, and William J. Morrow, for whose creditors plaintiff is trustee, is a son of Robert J. Morrow, deceased; that the said Robert J. Morrow at the time of his death, July 30, 1888, was seized in fee of a tract of ground situate on East Maiden street, in the borough of Washington, county of Washington, and state of Pennsylvania, bounded and described as follows, to wit: On the north by lot of heirs of T. M. T. McKennan, on the east by lot of William Denormandie, on the south by East Maiden street, on the west by lot of James Braner—said lot fronts sixty feet more or less on East Maiden street, and extends back same width to said McKennan lot; and that the said Robert J. Morrow left to survive him said widow and son and daughter, Mary Morrow Good, as his only heirs-at-law; and to the said only son and daughter, in and by his last will and testament, duly proved and recorded in the Register's office in Will Book No. 13, page 22, he devised the above-described lot of ground

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to his said two children, subject to the life estate of their mother, Barbara.

2. That on the 1st day of October, A. D. 1887, about ten months prior to the death of the said Robert J. Morrow, his wife, Barbara, agreed to her son, William J. Morrow, and he agreed to purchase from his mother a house and lot owned by her in her own right, situate on South Franklin street in the said borough of Washington, for the price or sum of $2,600, the mother agreeing to accept frem her son his one-half interest in his father's estate, being in the house and lot on East Maiden street, after the father's decease, subject to the dower interest in the same, at the price or amount of $1,600 as a part of said consideration money, and the balance in cash; that the husband and father, the said Robert J. Morrow, became a party to the said negotiations between the mother and son, stating at a family meeting at which all were present that he had disposed of his East Maiden street property, by his will then made, equally to son and daughter, subject to the life estate of their mother (which will bears date June 27, 1887), and then agreed with the wife and son that he would join in the deed of conveyance from his wife to the son for the said South Franklin street property.

3. That in pursuance of the above family arrangement, and on the same day, and in the presence of all the family of Robert J. Morrow, the following agreement in writing was drawn up, signed and delivered, between the mother and son, to wit:

"Agreement made this 1st day of October, A. D. 1887, by and between Barbara Morrow, of Washington county, Pa., party of the first part, and Will J. Morrow, of Washington, Washington county, Pa., party of the second part, witnesseth:

"That the said party of the first part does hereby agree to sell and deliver to the said party of the second part a house and lot located on South Franklin street, in town and county above mentioned, for the sum of $2,600; and the party of the first part does agree to take in part pay the interest and claim of the party of the second part, which will be $1,600, against a certain property located on East Maiden street, in which the said party of the first part now resides, and the balance, $1,000, to be paid in cash 'or its equivalent' when the party of the second part takes possession of said property, which is to be the 1st of April, 1888.

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"In witness whereof the said parties have hereunto set their hands and seals the day and year above mentioned.

"Barbara Morrow. [Seal]
"Will J. Morrow." [Seal]

4. That the said William J. Morrow entered into possession of the South Franklin street property on April 1, 1888, the date stipulated for his possession of the same in said above-recited agreement, and has since continued to reside therein; and his mother continued to be and remain in possession of the East Maiden street property under the will of her husband and said agreement of purchase of her son's interest from the date of her husband's death to the present time, and in connection with her married daughter, Mrs. Good, who resides therein under the devise of one-half interest therein to her.

5. That on the 31st day of May, 1888, the said Robert J. Morrow and Barbara Morrow conveyed to the said William J. Morrow, in consideration of the payment of $2,600, the lot in said above agreement described, on South Franklin street, which deed to him was then left for record in the proper office, which purchase money the said William J. Morrow had previously paid to the said Barbara Morrow on his taking possession of said property, and the same was receipted for by the said Barbara and her husband, Robert J. Morrow, to wit: $1,600 of said sum of $2,600 by the one-half interest of the said William J. Morrow in the East Maiden street property under the terms of the agreement of sale, and the remaining $1,000 by the said William J. Morrow paying and causing to be satisfied two mortgages of record against the said South Franklin street property, wherein Barbara Morrow was the real mortgagor to third parties, for $600 and $250 respectively, real amounts, and the giving of his judgment obligation for $150 to his mother at the same time for the balance of the purchase money, which note she still has unpaid and in her possession.

6. That the said Barbara Morrow never requested her son, William J. Morrow, to make her a deed for the one-half interest in the East Maiden street property, devised to him by his father, and purchased by her under the above-recited agreement of date October 1, 1887.

7. That the said William J. Morrow and Dora B., his wife, voluntarily, on the 21st day of January, 1901, conveyed to the said

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Barbara Morrow, by a quit-claim deed, which mentioned as the consideration for said conveyance the sum of $1, all their interest in and to the said above-described lot of ground situate on East Maiden street, in the borough of Washington, Pa., the only interest he ever had therein being that devised to said William J. Morrow by the will of his father, Robert J. Morrow, and then left said quit claim deed for record, and when same was transcribed, lifted it and presented and delivered said deed to his mother, Barbara Morrow, the grantee named therein, at her residence on the said East Maiden street property.

8. That during the years between the purchase by his mother of her son's interest in the East Maiden street property under articles of agreement, October 1, 1887, and the date of the quit claim deed to her, January 21, 1901, the said William J. Morrow was engaged in business in the borough of Washington, and on several occasions used the fact that there was no record evidence against his title to the undivided one-half of said property under his father's will to bolster up his credit and to the extent of, in one instance, pledging it as collateral to a loan he secured on his property.

9. That on the 19th day of May, 1901, the said William J. Morrow was adjudged a bankrupt in the United States District Court for the Western District of Pennsylvania upon a petition filed against him at No. 1,487, in bankruptcy, on the 24th day of April, 1901; and that on the 6th day of June, 1901, the plaintiff, at a meeting of the creditors of the said William J. Morrow, was duly elected a trustee of said bankrupt's estate, and evidence of his election and bond filed, and otherwise qualified to take charge of said bankrupt estate; and that the said William J. Morrow at the time of making of said quit-claim deed to his mother, the defendant, was a bankrupt, and under the laws of the United States all conveyances, transfers, assignments or encumbrances of his property, or any part thereof, made or given by him adjudged a bankrupt, are null and void, within four months prior to the filing of the petition, if made, done or placed thereon with the intent and purpose on his part to hinder, delay or defraud his creditors, or give any of them a preference.

10. That the said Barbara Morrow had no notice or knowledge of the threatened or real insolvency of her son, or that he had been forced into bankruptcy, until some time in May of 1901, when her daughter read it to her from a morning newspaper when it first

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appeared; and that the said conveyance by quit claim was not made, recorded and delivered with the intent and for the purpose of putting any real interest, that appeared from the record to be in him in the East Maiden street property, in his mother, Barbara Morrow, and out of the reach of his creditors, to hinder, delay or defraud them or any of them, nor as a preference to her, but to give to her a recordable title to that undivided one-half interest in the East Maiden street property, devised to him under the will of his father, and by him sold under said articles of agreement to his mother, the defendant, as far back as October 1, 1887, and paid for by her to William when he took possession in April of the following year of the South Franklin street property he received in exchange for his interest in the East Maiden street property and $1,000 in cash and note.

CONCLUSIONS OF LAW.

1. The execution and delivery of the quit-claim deed of William J. Morrow and wife, conveying all his right, title and interest in the East Maiden street property, described in paragraph 4 of the plaintiff's bill, to Barbara Morrow, dated January 21, 1901, under the facts found in this case, is not violative of any of the provisions of Sec. 67 of the act of Congress declaring null and void liens and conveyances of a bankrupt, created or made within four months of the filing of the petition in bankruptcy to give a preference, or hinder, delay or defraud creditors as averred in the plaintiff's bill.

2. The defendant is entitled to have the bill dismissed at the costs of the plaintiff.

And now, October 7, 1901, the bill is dismissed at the costs of the plaintiff.

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Court of Common Pleas of Montgomery County.

JONAS BOWMAN VS. PERKIOMEN VALLEY MUTUAL FIRE AND STORM INSURANCE COMPANY.

Plaintiff testified that his policy in defendant company was left with the secretary; and whilst there he effected additional insurance, of which fact he notified defendant's secretary. The policy contained a provision against additional insurance without notice, etc. The defendant's secretary denied notice. The question of waiver was left to the jury.

"Courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so, on which the party relied."

MOTION for new trial. No. 164, June T., 1900.

George W. Zimmerman, Esq., for plaintiff.

Louis M. Childs, Esq., for defendant.

Opinion of the court by WEAND, J., October 7, 1901.

The defendant in this cause has no reason to complain of the charge to the jury.

There was a question of fact which we were compelled to submit to the jury—i. e., Did plaintiff notify the defendant company of his additional insurance?

Plaintiff testified that his policy was in possession of the secretary, at the company's office; that he, plaintiff, told the secretary of his add tional insurance, to which reply was made "All right"; and that subsequently, and until the fire, assessments were made on the policy. The company offered testimony to refute plaintiff's allegation, and this raised the issue of fact of which the jury was to judge. It was not for the court to declare the evidence of notice or waiver insufficient.

"Courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so, on which the party relied. Any agreement, declaration or course of action on the part of the insurance company that would lead an insured party to believe honestly that by conforming thereto a forfeiture of his policy would not be incurred, would and should stop the company from insisting upon the forfeiture, although it might be claimed under the express letter of the contract": Insurance Co. vs. Eggleston, 96 U. S., 572; Gonder vs. Insurance Co., 17 Pa. Superior Ct., p. 119; Mix vs. Royal Insurance Co., 169 Pa., 639.

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The jury could have rendered a different verdict without just cause of complaint on part of plaintiff, and it may be, as argued by defendant, that they were moved by prejudice against defendant as a corporation; but this reason can be urged in every case in which there is a verdict against a corporation on disputed facts.

And now, October 7, 1901, motion for a new trial is overruled.

E. BARBER VS. LEVI C. SNYDER AND MARYAN OR ANN SNYDER.

A trust can not be created by a man in favor of himself which excludes the creditors of the grantor from recourse to his estate, legal or equitable. Both the income which he claims and the corpus which he conveys remain subject to the demand of creditors, notwithstanding any provision to the contrary in the conveyance.

ATTACHMENT execution. No. 109, October T., 1901.

A. R. Place, Esq., for plaintiff.

Wm. F. Dannehower, Esq., for garnishee.

Opinion of the court by WEAND, J., November 18, 1901.

The answer of the garnishee admits moneys in its hands belonging to Mary Ann Snyder, but sets up a declaration of trust by said Mary Ann Snyder to said garnishee.

This trust is for the sole and separate use of the grantor, "so that no part of the estate hereby granted shall at any time hereafter be subject in any manner whatsoever to the control, engagements, debts or liabilities of the said party of the first part."

That such a trust does not preclude creditors of the latter from a recourse to the fund has been frequently decided, as will be seen by a reference to Patrick vs. Bingaman, 2 Sup. Ct., 113, in which case the whole subject is discussed and authorities cited. The principle decided was that "while a man may exclude the creditors of another whom he makes his beneficiary, he can not exclude his own creditors from recourse to his estate, legal or equitable. Though he may settle his estate beyond his own reach or control, by conveying to a trustee, he can not by such a device place it beyond the reach of his creditors. Both the income which he claims and the corpus which he conveys remain subject to the demand of creditors, notwithstanding any provision to the contrary in the conveyance;

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and this liability extends not only to debts existing at the time of the conveyance but to those afterward contracted. In short, his estate, legal and equitable, is regarded as at all times assets for the payment of debts, and a conveyance of any part of it, with intent to place it beyond the reach of creditors, is deemed fraudulent."

Judgment will be entered for plaintiff on garnishee's answers on plaintiff submitting a proper decree.

Court of Common Pleas of Philadelphia County, No. 4.

Fry & Co. vs. Howes.

Plaintiff, a corporation in the coffee business in Philadelphia, employed the defendant as a salesman, for a year, by an agreement providing: "This agreement shall terminate at the option of the said Henry A. Fry & Company, if at any time they shall see fit, for any cause." In the middle of the year the defendant left the service of the plaintiff and took service with the other defendants as a salesman. Upon a bill in equity to enjoin the defendant salesman from taking service with the other defendants, *held*, that as plaintiff had an option to terminate its responsibilities under the contract at any time for any cause, while the defendant salesman was sought to be bound for a year, the contract was so lacking in mutuality of remedy and obligation as to be not enforceable in a court of equity.

Bill of complaint and demurrer in equity.

Plaintiff, a corporation engaged in the coffee business in Philadelphia, employed the defendant, Howes, as a coffee salesman to travel for the plaintiff and sell the plaintiff's goods, by an agreement in writing, dated March 31, 1899, for one year from that date, the agreement containing this provision:

"Clause 4. This agreement shall terminate at the option of the said Henry A. Fry & Co., if at any time they should see fit, for any cause."

Plaintiff filed the bill, praying an injunction and alleging a renewal of the contract from year to year. The plaintiff prayed an injunction restraining the defendant from giving his services as a traveling salesman to any person other than the plaintiff until after March 31, 1902.

To this bill the defendants demurred.

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Theodore W. Reath and *Thomas Reath, Esqe.*, for defendants on the demurrer.

The words "any cause," in clause 4, mean any motive or reason: 5 Am. & Eng. Ency. of Law, 2d ed., 775.

The meaning of the word "cause" in such a connection is determined by context: Edson vs. Hayden, 20 Wis., 682 (1866); Langstaff vs. Rock, 13 Mo., 579 (1850).

In the particular contract in this case the words "for any cause" occur in relation to an option of plaintiff to terminate the contract whenever plaintiff should see fit, and must therefore be construed to include only such causes, reasons or motives as might operate with the plaintiff, such as dull business or lack of profits. In short, any reason which would be sufficient to the minds of the officers of the plaintiff would be such a cause, and the clause 4 has no relation or bearing upon the conduct of the defendant. Plainly, the words "any cause" do not relate at all to the conduct of the defendant, nor do they mean that he may be discharged for just cause.

Contracts, such as this one, to restrain the activities of a man, are not in favor by law or equity: Seward vs. Shields, 9 Dist. R., 583 (September, 1900); Ball Club vs. Pickett, 8 Pa. C. C. R., 232 (1890), is not in point with the case at bar, because no question of mutuality there arose, the ball player having received a portion of his salary for the year and having then deserted his club before playing any base-ball. The court enjoined an attempted fraud by the ball-player upon a contract which had been executed by his employer. In the case at bar the whole effort is simply to restrain the activity of the defendant in the future.

Cases in point on principle are: Marble Co. vs. Ripley, 10 Wall., 339 (1870); Rust vs. Conard, 47 Mich., 449 (1882); Ball Club vs. Hallman, 8 Pa. C. C. R., 57 (1899); Ball Club vs. La Joie, 58 L. I., 276; 10 Dist. Rep., 309 (1901).

W. C. Gross, Esq., for plaintiff, cited:

Lumley vs. Wagner, 1 De Gex, M. & G., 601; Daly vs. Smith, 49 Howard's Practice Rep., 150; Philadelphia Base-Ball Club vs. Hallman, 47 Leg. Int., 130; Montague vs. Flockton, L. R. (equity cases), Vol. 16, 189; American Association Base-Ball Club of Kansas City, Mo., vs. Pickett et al., 47 Leg. Int., 212.

Opinion of the court September 20, 1901.

Demurrer sustained and bill dismissed with costs to defendants.

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Court of Common Pleas of Montgomery County.

ALAN W. CORSON VS. BURGESS AND TOWN COUNCIL OF THE BOROUGH OF NORRISTOWN.

A municipal corporation can appeal from the judgment of a justice of the peace without payment of costs other than the costs of the appeal, under the act of April 19, 1901, P L 84, when bail absolute for debt, interest and costs is given. Apart from the act of 1901 a municipal corporation can appeal from the judgment of a justice of the peace without payment of costs.

MOTION to strike off appeal. No. 79, October T., 1901.

Henry M. Frcedley, Esq., for plaintiff.

I. P. Knipe, Esq., for defendant.

Opinion of the court by WEAND, J., November 21, 1901.

The plaintiff brought suit before a justice of the peace against the defendant borough to recover for services rendered. Judgment was rendered against the defendant and an appeal taken. Bail absolute for all debt with costs that may accrue upon appeal was given, and proper affidavit made. The costs in the case, as appears by the transcript, amounted to four dollars; but the defendant only paid the costs of the appeal, thirty cents, which was the only amount demanded by the justice. The defendant's counsel when taking the appeal had offered to pay all costs which the justice might demand. The plaintiff paid the balance of costs without objection or question, and not under protest.

The plaintiff now asks to have the appeal quashed because defendant did not pay all the costs. This demand is inequitable. The defendant was in no default, for the justice demanded of the defendant no more costs than were paid. The plaintiff in paying the balance of costs voluntarily misled the justice and defendant, although not intentionally. Had he refused to pay any part of the costs, and demanded them from the defendant, they would have been paid. If the law compelled the defendant, a municipal corporation, to pay the costs upon appeal, we would not strike off the appeal but allow payment *nunc pro tunc* as per offer of defendant on file.

The defendant, however, contends that a municipal corporation is not compelled to pay costs on appeal.

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The act of June 24, 1885, P. L. 159, provides that "in all cases of appeal from the judgment of an alderman or a justice of the peace, the said alderman or justice shall be entitled to demand and receive from the appellant the costs in the case before making and delivery of the transcript for said appeal," etc. In Carbaugh vs. Sanders, 13 Sup. Ct. Rep., 361, this language was held to be compulsory, and the appeal was stricken off because all the costs had not been paid. The suit, however, was against an individual.

The language of the act of 1885 is no stronger than that contained in previous acts relating to appeals, under which it was held that municipal corporations could appeal without the payment of costs: Robinson vs. Jefferson County, 6 W. & S., 16; Pottsville vs. Curry, 32 Pa., 443; King vs. District of Penn, 1 Phil., 402.

The act of March 15, 1847, P. L. 361, Sec. 1, provides that "when any corporation (municipal corporations excepted), being sued, shall appeal or take a writ of error, the bail requisite in that case shall be taken absolute for the payment of debt, interest, costs," etc. And this was held to apply to an appeal from the judgment of a justice of the peace: Germantown and Perkiomen Turnpike Co. vs. Naglee, 9 S. & R., 257.

We do not think that the act of 1885 changes the law upon the subject, and that the construction placed upon the earlier acts relating to the same subject must also apply to this act: Evans vs. Ross et al., 107 Pa., 231.

In Gamble vs. Lebanon, 3 C. C., 594, Judge McPherson held that municipal corporations are not bound to pay costs, under the act of June 24, 1885, before taking an appeal.

To the same effect is Commonwealth vs. Batdorf, 7 C. C., 242; Koontz's Administrators vs. Howsare, 100 Pa., 506.

We are of opinion that a municipal corporation can appeal from the judgment of a justice of the peace without payment of costs; but if we are in error, then this appeal is good under the act of April 19, 1901, P. L. 84, which allows an appeal by defendant on payment only of the costs of the appeal when he gives bail absolute for debt, interest and costs. And the defendant has complied with both conditions.

And now, November 21, 1901, the motion to strike off the appeal is dismissed.

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Court of Common Pleas of Lancaster County.

McFeely vs. Hohein.

Where a sheriff's return of the service of a summons is regular on its face it is conclusive between the parties and can not be set aside on extraneous evidence, even though false. The proper remedy is against the sheriff for making a false return.

Rule to strike off sheriff's return.

C. Reese Eaby, Esq., for rule.

D. F. Magee, Esq., contra.

Opinion of the court by Landis, J., June 22, 1901.

This suit was entered by the plaintiff on March 14, 1899, the sheriff making return that he had "summoned the within-named Frank Hohein by leaving a true and attested copy of the within writ at his residence with an adult member of the family." On April 22, 1899, C. Reese Eaby, as attorney for the defendant, filed a special appearance, for the purpose of contesting this return; and, on May 20, 1899, he made an affidavit that Frank Hohein was not within this jurisdiction, and that the place mentioned within the return as his residence never was his residence, and therefore no service was ever had upon him. This is the point of contention between the parties, and to test it this rule was obtained.

By the act of June 13, 1836, Sec. 2, P. L. 572, it is provided that "a writ of summons shall be executed, (1) by reading it in the hearing of the defendant; (2) by giving the defendant notice of its contents and by giving him a true and attested copy thereof; (3) by leaving such copy at his dwelling-house in the presence of one or more adult members of his family; (4) if the defendant resides in the family of another, by leaving it with one of the adult members of the family in which he resides." The uncontradicted evidence, taken upon depositions, would seem to establish that this defendant is a married man, residing with his family in Newport News, Virginia, and that he has lived in that state since September, 1898, and has not lived at the place where the summons was left for eighteen years, that particular house being the residence of his father, who is since dead.

The one question, therefore, to be settled is whether the sheriff's return is conclusive on the defendant. There can be no doubt

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but that where the return on its face does not show a legal service, it is our duty to set it aside on a timely motion to dismiss: Winrow vs. Raymond, 4 Pa., 501; Encyclopedia of Pleading and Practice, Vol. 19, p. 709. But it has long since been definitely determined that such return, when regular, must be considered as conclusive between the parties to the action. It is error to set it aside upon extraneous evidence, and affidavits and depositions produced for that purpose constitute no part of the record. The return can not be contradicted *aliunde:* Benwood Iron Works vs. Hutchinson & Bro., 101 Pa., 359; Bennethum vs. Bowers, 133 Pa., 332; Zion Church vs. St. Peter's Church, 5 W. & S., 215; Philadelphia Demokrat Pub. Co. vs. Edwards Sad Iron Co., 9 Dist. R., 56. This rule applies, even though the return is utterly false: Hunt vs. Economical Mutual Benefit Association, 17 W. N. C., 423; MacGeorge vs. Chemical Manufacturing Co., 141 Pa., 575; 1 Brewster's Practice, Sec. 2311, p. 972. If such is the case, the proper remedy is against the sheriff for making a false return: MacGeorge vs. Chemical Manufacturing Co., *supra;* or, where the defendant was not suable in the courts of the state, by a plea in abatement to the jurisdiction: Benwood Iron Works vs. Hutchinson & Bro., *supra;* National Bank of Northern Liberties vs. American Ship Building Co., 2 Cent. Rep., 56; 1 Brewster's Practice, *supra;* The Camden Rolling Mill Co. vs. The Swede Iron Co., 32 N. J. L., 15; Newell vs. The Great Western Railway Co., 19 Mich., 336; Encyclopedia of Pleading and Practice, Vol. 19, p. 707. The only exception seems to be when the defendant has ceased to exist: Hintermeister vs. Williams, 33 P. L. J., 365.

As, therefore, the return in this case is regular on its face, it can not be attacked by extraneous evidence; and as the proper remedy has, in our judgment, not been pursued by the defendant, we are obliged to discharge the rule.

Rule discharged.

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Court of Common Pleas of Montgomery County.

IN EQUITY.

EDWARD GLENN VS. JOHN CHRISTIE.

Equity will intervene for the protection of the injured party where the trespasses are continuous and remediable at law only by a multiplicity of suits. Especially is this true where the injury is the result of continuous negligence and the wrongs amount to more than mere personal inconvenience.

The owner of a quarry who conducts his blasting so negligently as to cast rocks, stones and spalls upon the property of his neighbor, will be restrained by injunction.

FINDINGS and conclusions of the court upon final hearing. No. 11, March T., 1901.

Larzelere, Gibson & Fox, Esqs., for plaintiff.

L. M. Childs and *Henry Pleasants, Esqs.*, for defendant.

Opinion of the court by SWARTZ, P. J., October 31, 1901.

The plaintiff, Edward Glenn, is the owner of a property in Lower Merion township. West of these premises the defendant, John Christie, operates a stone quarry. The plaintiff contends in his bill that the defendant conducts his blasting in an unlawful and reckless manner, whereby large stones are cast upon the plaintiff's property, dangerous to life and limb and destructive to his buildings and grounds.

The defendant denies the use of excessive explosives, and alleges that there is no negligence or recklessness in the conduct of his blasting.

FINDINGS OF FACTS.

1. The plaintiff is the owner of a tract of land containing six acres. He erected thereon a mansion-house and barn. The grounds are adorned with trees and shrubbery. The lawns are carefully kept and a tennis court is maintained. The plaintiff and his family occupy the premises. The grounds are under the care of a gardener. The property is located a short distance from the village of Ardmore, and land in the immediate neighborhood is very valuable.

2. The defendant's quarry is located on the west side of Ardmore avenue; the breast of the quarry is about two hundred and fifty feet distant from the said avenue. The plaintiff's property abuts on the east side of this avenue for something over one hundred feet.

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The quarry breast is oval, and faces at its centre the premises of the plaintiff. The distance of the quarry breast from the mansion-house is about seven hundred feet. The plaintiff's barn is one hundred feet nearer the quarry breast. The mansion and barn are located on a bluff; the defendant's quarry is also upon high ground. A ravine runs along Ardmore avenue between the properties of the plaintiff and the defendant. A triangular tract of ground, located on the east side of Ardmore avenue, and owned by Dr. Anderson, intervenes between the properties of the plaintiff and the defendant.

3. The defendant operated his quarry for a period of fourteen years. From time to time stones were cast upon the premises of the plaintiff by the blasting. Within the last two years the size of the falling stones has increased. As many as three hundred stones in a year were cast upon the plaintiff's grounds. One stone weighed as much as four hundred pounds, and dropped in plaintiff's orchard just back of his barn. Other stones fell near the house, weighing four or five pounds. A small stone struck the window-sill of the house; another fell near the kitchen door. At times the gardener had to quit work upon the lawn to escape the falling stones. Stones were cast over and beyond the mansion-house of the plaintiff a distance of more than seven hundred feet from the quarry.

4. The casting of stones and spalls upon plaintiff's property is due to the negligence of those in charge of the blasting at defendant's quarry, especially so in blowing the horizontal holes in the breast of the quarry facing the plaintiff's buildings.

5. The defendant's witnesses show by their evidence that the quarry operations, if properly conducted, will not cast any stones or spalls upon the plaintiff's premises.

6. Since the filing of the bill the operations at the quarry give the plaintiff very little inconvenience.

CONCLUSIONS OF LAW.

1. The court having found as a fact that the defendant conducted his operations at the quarry in a careless and negligent manner, resulting in repeated and continuous trespasses upon plaintiff's property, it follows that the plaintiff is entitled to an injunction restraining the negligent and careless blasting.

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Glenn vs. Christie.

REASONS IN SUPPORT OF OUR FINDINGS AND CONCLUSIONS.

Five witnesses on the part of the plaintiff testify that stones and spalls were cast upon the plaintiff's grounds and about his buildings. Many of the stones were so large as to endanger the lives of those occupying the premises or working upon the grounds. The defendant failed to produce any evidence to overcome the testimony of the eye-witnesses called by the plaintiff.

That the throwing of stones to the distance of six hundred feet and more was due to negligence, is shown by the evidence of Clarence Connell, called by the defendant. The witness is of opinion that stones cast upon the premises of plaintiff must be due to the mismanagement of the powder-man. Mr. Connell is an experienced quarryman.

Mr. Dunn, an engineer, also called by defendant, declares that the heavy blasting ought not to throw spalls. "I think I could put it (the powder) in so that it would not throw spalls."

That equity will intervene for the protection of the injured party where the trespasses are continuous and remediable at law only by a multiplicity of suits, is well established: Scheetz's Appeal, 35 Pa., 88; Evans vs. Fertilizing Co., 160 Pa., 209. Especially is this true where the injury is the result of continuous negligence and the wrongs amount to more than mere personal inconvenience: Walters vs. McElroy, 151 Pa., 549.

We discussed the rights of the quarryman and adjacent landowners at some length in the case of Frazier et al. vs. Pennypack Trap Rock Co., 17 Montg. Law Rep., 105, and we refer to that opinion in further support of the injunction now awarded.

And now, October 31, 1901, unless exceptions are filed to our findings and conclusions as provided in the equity rules, the prothonotary will enter a final decree as of course restraining and enjoining the said defendant, his agents, employees and workmen, from carrying on the blasting upon the defendant's premises in a negligent and reckless manner, whereby rocks, stones and spalls are cast upon the plaintiff's property.

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Court of Common Pleas of Erie County.

COMMONWEALTH EX REL. vs. GINRICH, CONTROLLER OF THE CITY OF ERIE.

The city of Erie has no right to appropriate money tor the purpose of entertaining as the guests of the city the delegates to the convention of the League of Cities of the Third Class of Pennsylvania, which met in the city of Erie, in June, 1901.

SUR petition for mandamus.

——— *Hewes, Esq.*, for relators.

Baker & Sproul, Esqs., for respondents.

Opinion of the court by THOMAS, P. J., October 29, 1901, specially presiding.

The original petition, return and demurrer in this case were filed Aug. 26, 1901, and thereupon it was amicably submitted for our determination of the legal questions involved.

Upon argument, an attempt was made to raise questions not raised by the pleadings, which are, in our opinion, insufficient for the purpose of determining any question other than the one of the power of the legislative authority of the city of Erie to appropriate the money of the city for the purpose of receiving and entertaining, as the guests of the city, the delegates to the convention of the League of Cities of the Third Class, of Pennsylvania, while said convention was being held in the said city of Erie in June last. The return sets this up as a legal reason why the mandamus should not be obeyed, and is therefore sufficient: Kell vs. Rudy, 1 Sup. Ct. Rep., 507.

It seems to be conceded that the items objected to on the part of the defendant are for expenses incurred in the giving of a "fish dinner" to the said guests and invited residents of the city, but was not so given in the regular course of the proceedings or deliberations of the said convention.

But, however this may be, the entire question reverts to the proposition as to whether or not the city's money may be appropriated for the entertainment of guests of the city.

The relators rely for their authority upon the act of May 23, 1889, P. L. 277, Art. 5, Sec. 3, pl. 46, of which, in declaring the purposes for which cities of the third class are authorized and empow-

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ered to enact ordinances, confers the power "to make all such ordinances, by-laws, rules and regulations, not inconsistent with the Constitution and laws of this commonwealth, as may be expedient or necessary, in addition to the special powers in this section granted for the proper management, care and control of the city and its finances, and the maintenance of the peace, good government and welfare of the city, and its trade, commerce and manufactures, and the same to alter, modify and repeal at pleasure." As an interpretation of like or similar powers we are referred to Com. vs. Pittsburg, 183 Pa., 202; Tagg vs. Philadelphia, 18 W. N. C., 79; and Tatham et al. vs. Philadelphia, 2 W. N. C., 564.

In Com. vs. Pittsburg, the dispute arose over the power of the city to appropriate money to a committee of private citizens to make a preliminary investigation as to the feasibility of a ship-canal connecting Pittsburg and Lake Erie.

The court held that the city had such power, as "the purpose for which it was made was certainly not foreign to the material interests and general prosperity of the municipality, but quite the contrary."

It would seem very clear that such a purpose looked directly to the welfare of the municipality, and especially so of its commerce, trade and manufactures. It looked to municipal benefits, and, consequently, was a proper subject for municipal expenditure.

Tagg vs. Philadelphia was an action of assumpsit for the price of a dinner furnished under a contract by authority of an ordinance entitled, "An ordinance providing for the reception and entertainment of the mayor of New Orleans and other representatives of the municipal government of that city on the return of the old liberty bell," in which it was held, under the authority of Tatham et al. vs. Philadelphia, that the public money might lawfully be expended for such a purpose, and that the plaintiff was entitled to recover.

Tatham et al. vs. Philadelphia was a bill filed to prevent the officials from giving effect to an ordinance appropriating to the mayor of said city the sum of $50,000 to meet "the official contingent expenses incidental to the Centennial exhibition," but which it was averred was "to enable the mayor to extend the hospitalities of the city to such persons as he might deem worthy thereof, to entertain them," etc.

The court held that "the ordinance does not authorize the

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mayor to extend the hospitalities of the city to visitors, if that was not already a part of the official duty," but, after reviewing the authority conferred upon the mayor and councils by several acts of Assembly, in view of the usages thereunder, held "that councils may, in the exercise of a sound discretion, appropriate such sums as they may deem expedient for the commemoration of events of public interest, or the entertainment of the guests who are drawn to the city on such occasions." In so holding, the court, after referring to the rule that "without express power, a public corporation can not make a contract to provide for celebrating the Fourth of July, or to provide an entertainment for its citizens or guests," says: "But neither the general rule, nor any of the precedents cited, are decisive of the present case. Regard must be had to the terms of the municipal character and the usage under it, if the usage has acquired the force of an established construction," and after citing numerous incidents of like appropriations and the usages under the various acts of Assembly, arrives at the foregoing conclusion.

But what may, by the force of usage, have become the settled law in Philadelphia, a city of the first class, can not for that reason determine the law as to similar matters in the city of Erie, or in cities of the third class generally, where no such usage is shown or averred to exist, and of which we have no knowledge.

In the case of Bergner vs. Harrisburg, 1 Pearson, 291, it was held that the city authorities of Harrisburg had no authority to appropriate the city's money to meet the expenses incurred in the reception of the President of the United States and other federal officials who were invited to the city, pursuant to a resolution of the municipal authorities extending to them the hospitalities of the city, inasmuch as no general authority therefor existed (although the act incorporating the city of Harrisburg is quite similar as to powers conferred, to the act of 1889, under which the city of Erie is operating), nor was there any well established custom in Harrisburg which would warrant such action.

Municipal corporations can exercise no powers excepting such as are conferred upon them by the act by which they are created, by the general laws of the commonwealth, or such as are a necessary incident to the exercise of their corporate rights and duties, and we are of opinion that the charges not being incurred for any-

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thing that could confer a municipal benefit, no authority, either conferred by law or shown to have been derived from usage, would authorize the expenditure here sought to be enforced: Hodges vs. Buffalo, 2 Denio, 110; Hood et al. vs. Mayor and Aldermen of Lynn et al., 1 Allen, 103.

Nor are we persuaded that the expenditures in this case can be authorized on the ground that they conferred a municipal benefit because they were incurred in the reception and entertainment of delegates to the convention referred to. It is true, such convention was held to further the interests and promote the welfare of Erie as well as all other third-class cities, but the reception and entertainment of the delegates was not a necessary incident to such action, nor one from which the municipalities in general, or particularly that of Erie, would or could derive a municipal benefit.

The defendants admit upon argument as well as by their answer the validity of the bills of

Lewis Avery, for	$5.00
John B. Laver, for	10.00
John J. O'Brien (badges), for	50.00
Total	$65.00

and without discussing this feature of the case we shall enter a decree accordingly.

And now, October 26, 1901, this case came on to be heard, and was argued by counsel, and upon due consideration thereof it is ordered, adjudged and decreed that a writ of peremptory mandamus issue upon W. W. Gingrich, controller of the city of Erie, directing him to issue and approve a warrant to the relators in the sum of $65 for the payment of the bills of Lewis Avery, for $5; of John B. Laver, for $10; and of John J. O'Brien, for $50, as admitted by defendants to be due and payable.

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Court of Common Pleas of Montgomery County.

IN EQUITY.

REMANDUS SCHEETZ ET AL. VS. THE SCHOOL DISTRICT OF THE BOROUGH OF NORRISTOWN ET AL.

Equity jurisdiction—Taxpayers' bill.

Where money is to be raised by taxation the interest of a taxpayer entitles him to test in equity the validity of the law which proposes the taxation, and the power of a court of equity to restrain at the instance of taxpayers an unlawful act of the board of school directors is beyond any doubt.

Powers of school boards generally.

When acting within the limitations of the law, the judgment of school directors on matters committed to them is final, although a gross abuse of discretion on the part of school boards may be corrected by the courts.

Municipal indebtedness.

While a school distrfct may not appropriate money, by resolution or otherwise, if by such action the indebtedness of the district is increased beyond the constitutional limitation, nevertheless if the money to be expended is provided for out of the annual revenues of the district the appropriation is not unlawful.

Constitutionality of the Library act of 1895.

The act of 1895, P. L. 411, providing for the establishment of free libraries in school districts, excepting in cities of the first and second class, is not unconstitutional. Public bodies or communities which have a similarity of situation, circumstances and requirements, may be grouped together for purposes of legislation, notwithstanding the constitutional prohibition against special legislation: Com. vs. Gilligan, 195 Pa., 504.

DEMURRER. No. 1, June T., 1901.

John Faber Miller and *E. F. Kane, Esqs.*, for plaintiffs.

J. P. Hale Jenkins and *N. H. Larselere, Esqs.*, for defendants.

Opinion of the court, November 21, 1901, by EDWARDS, President Judge of the Forty-fifth Judicial District, specially presiding.

Solicitors for defendants interpose a demurrer to the plaintiffs' bill in this case. The main grounds of the demurrer are:

(1) That complainants are not parties in interest; (2) they are not entitled to the relief claimed in the bill; (3) the court has no jurisdiction.

In order to understand the principles of law involved and hereinafter discussed, we shall briefly refer to the main facts set forth in the bill of complaint. It appears that prior to May 3,

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1901, certain citizens of the borough of Norristown desired to secure the aid of Andrew Carnegie to establish a free public library in Norristown. After some correspondence and other preliminary work the Norristown School Board, at a regular meeting held May 3, 1901, passed the following resolution:

"Whereas, Hon. Andrew Carnegie made the following proposition: 'If Norristown will provide a suitable site, and by ordinance agree to tax itself to extent of $5,000 a year for the support of library, . . . he will be glad to give $50,000 for a library building';

"And whereas, the citizens of Norristown and elsewhere, by public subscription are providing (with other money made available) the necessary means to purchase the Slingluff property, opposite the high school, at the price of $20,000, as and for the most suitable site for a new public library;

"Therefore, be it and it is hereby resolved by the Board of School Directors of the borough of Norristown, in regular meeting assembled, and acting by virtue of the power invested in said School Board under the act of the General Assembly of the Commonwealth of Pennsylvania, passed June 28, A. D. 1895, and supplements, in consideration of the offer of the Hon. Andrew Carnegie, to give the sum of $50,000 for the erection of a public library building, and of the donations by those contributing moneys for the purchase of a suitable site, the same are hereby duly accepted and the said School Board agrees annually to lay a tax on the valuation of the property assessed for school purposes, sufficient to raise the sum of $5,000, which tax shall be collectible as the school taxes of the district are at the time of collecting the same; and said sum of $5,000 so annually collected shall be appropriated for and toward the support, maintenance and increase of said free public library.

"Resolved, That a copy of this resolution be duly certified to the Hon. Andrew Carnegie by the President and Secretary of the School Board under its common seal."

A copy of the foregoing resolution had been sent to Carnegie previous to the meeting of the School Board, as the following letter shows:

"Office of Andrew Carnegie, Room 325 Carnegie Building, Pittsburg, Pa. R. A. Franks, Cashier. April 26, 1901. Dear Sir—Your favor of the 18th inst., addressed to Mr. Andrew Car-

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negie, has been referred to me, as Mr. Carnegie has gone abroad for the summer.

"A resolution such as you enclose, accepting Mr. Carnegie's offer of $50,000 for a library building for your city, and guaranteeing to furnish a suitable site and a permanent maintenance fund of $5,000 per annum, is satisfactory; copy of same under seal of the city to be sent to this office.

"As to method of making payments on account of construction of building, would say that I will make remittances of $5,000 each as needed from time to time during the course of construction, upon requests signed by the President and Treasurer of the Library Commission, accompanied by architect's estimate.

"Yours very truly, R. A. Franks."

On close examination of the communication from Mr. Carnegie's cashier it will be observed that the writer believed he was dealing with a municipality of some kind and not with a school district. He says "if Norristown will provide a suitable site;" and, that the money is "for a library building for your city;" and he wants a copy of the resolution "under seal of the city." He evidently did not know whether Norristown was a borough or a city, although he had a copy of the resolution of the School Board before him. The plaintiffs claim that this indefiniteness in the Carnegie proposition is fatal to the library project. The contention is utterly untenable and is a trivial technicality unworthy of further consideration. The *status* of the transaction is fixed by the resolution of the School Board.

The plaintiffs' most serious objections are to be found in the twelfth paragraph of the bill and in the amendment to the bill which was allowed at the argument. The twelfth paragraph sets forth in part:

"That the Board of Directors of said school district, in accepting, as aforesaid, the said proposal of the said Andrew Carnegie and in agreeing to levy the tax aforesaid, acted and is acting in an illegal and unlawful manner and beyond their powers as directors of said school district, inasmuch as said agreement, if carried into effect, imposes a perpetual burden upon your orators and other citizens of and property owners in said borough, and is an effort on the part of the present directors of the said school district to legislate for and to obligate all subsequent directors hereafter to be elected in the said school district; that a

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tax of the character of the one above mentioned, not being for the purpose for which a school district is authorized by law to levy and collect taxes, is itself unlawful and not within the power of the said school directors to impose; that neither the said school district nor said directors have any authority whatever in law to appropriate any part of the moneys collected by them from your orators and other citizens of the said school district, as school taxes, for library purposes, nor to agree that such appropriation shall be hereafter made."

The amendment alleges that the levy of $5,000 will increase the debt of the school district beyond the constitutional limit of two per cent.

The legal questions raised will now be considered:

I. ARE THE COMPLAINANTS PARTIES IN INTEREST AND HAS THE COURT JURISDICTION IN EQUITY?

We answer both questions in the affirmative. The plaintiffs are "resident qualified electors of and taxpayers and owners of real estate and personal property located and subject to taxation for school and other purposes in the borough of Norristown." There can be no manner of doubt as to the interest of the complainants, nor, as to the jurisdiction of the court. Bispham's Equity, Section 424, correctly and briefly states the law on the subject. In a proper case relief will be granted in equity not only where the property of the complainant himself is the subject of the tax, but also in those cases in which his sole interest is that of a taxpayer seeking to have the constitutionality of the tax settled, or where the purpose is to restrain the illegal disposition of municipal or county moneys, or the creation of an illegal debt, which the taxpayer, in common with others, might be obliged to pay. And this proposition is sustained by abundant authority in our own state. "The interest of a taxpayer where money is to be raised by taxation or expended from the treasury, entitles him to test in equity the validity of the law which proposes that taxation or expenditure": Page vs. Allen, 58 Pa., 338; St. Clair School Board's Appeal, 74 Pa., 252. "As to the power of a court of Common Pleas, as a court of equity, to restrain at the instance of the taxpayers, an unlawful or inequitable act of the board of school directors, we have no doubt": Appeal of Witmer et al., 15 Alt. Rep., 428. It is unnecessary to refer

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to other cases. They may be found in the cases already cited. We therefore hold that the plaintiffs are proper parties and that we have jurisdiction.

II. ARE THE COMPLAINANTS ENTITLED TO THE RELIEF PRAYED FOR?

Several reasons are assigned in the bill to prove that the relief sought should be allowed.

1. It is claimed that the agreement of the School Board to levy an annual tax of $5,000 for the maintenance of the proposed library is inequitable, and is not only an abuse of discretion, but is also an illegal act, because it is an attempt on the part of the members of the present School Board to legislate for their successors.

This objection is easily answered. When acting within the limitations of the law, the judgment of school boards on matters committed to them is final. It is true that a gross abuse of discretion may be corrected by the courts; but, in the present case, we do not consider an annual appropriation of $5,000 for the purpose stated unreasonable. There is no merit in the contention that the members of the School Board are attempting to bind their successors; because, there is express legislative authority for doing this very thing, if the act of 1895 is constitutional, and is not repealed.

2. The action of the School Board constitutes an attempt not only to impose upon the district a permanent indebtedness without provision for redemption, but an indebtedness in excess of the constitutional limit of two per cent.

If the action of the School Board is to be considered as the creation of a debt, then either of the reasons assigned would be fatal to the library project. The amendment to the bill alleges that the assessed valuation of property in the school district on June 3, 1901, amounted to $9,121,855, and that on the same date the indebtedness of the district amounted to $178,500. We are of the opinion that the agreement or resolution of the School Board to levy an annual tax of $5,000 for the support of a library is not the creation of a debt within the meaning of any act of Assembly or of the constitution. Counsel for plaintiffs have called our attention to the case of the City of Erie's Appeal, 91 Pa., 398, claiming that it is applicable to the case at bar. We think there is a radical difference between the cases. The indebtedness of

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the city of Erie was over seven per cent. on the assessed valuation of its taxable property when the councils entered into a contract for the erection of a market house. It is true that the purchase price was to be paid in annual payments of $1500, or more, according to the cost of construction; but the act of the councils was the creation of a present indebtedness. They entered into a contract there and then and an immediate liability on the part of the city was the result. The city had no means in sight to meet the payments. The case was before the court on a demurrer, so that there was no opportunity to show that the payments could have been met out of the current or annual revenues of the city. Indeed, the Supreme Court, in its opinion says: "Had the defendant in the bill before us, instead of demurring, made answer that its annual revenues were sufficient, over and above the payment of the interest of its indebtedness and the ordinary expenses of the city government, to meet the rent proposed to be paid, a very different case would have been presented for consideration. But the demurrer, admitting, as it does, the allegations of the bill, raises the single question of the power of the city to contract a new debt, notwithstanding its present indebtedness exceeds the constitutional limit, *and this without reference to its resources or present ability to meet and pay the contract intended to be entered into.*"

The case at bar presents an entirely different phase; and the fact that it is before us on a demurrer makes no difference, because the bill itself discloses the means by which the appropriation of $5,000 is to be paid annually. While it is true that the resolution of the School Board in one sense imposes a future liability on the district, it is also true that the same resolution and the act of 1895 point out the exact method by which the liability is to be met, viz: by taxation. There is no debt in any other sense of the term. The site for the library is donated by the citizens of Norristown; Mr. Carnegie donates $50,000 for the library and building and the School Board agrees to maintain it from the current annual revenue. The fact that the law expressly authorizes a tax of one mill on the assessed valuation of the district for the maintenance of the library completely removes the objection interposed in the case of the city of Erie. The proposition before us is not to create a debt within the meaning of the constitution, but to increase the current revenue of the

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school district for a lawful purpose, and in an amount, as the facts before us disclose, far below the maximum limit stated in the act of 1895. If the time should ever come when the assessed valuation of property in the Norristown school district should fall below $5,000,000, and the law should remain as it is now, the levy could not exceed one mill. Or if a future School Board should refuse to make a levy of any amount for the maintenance of the library, we have very little doubt as to the remedy by mandamus. But these questions are not before us now. In the particular phase of the case now under discussion the question is, whether by any rule of construction the action of the School Board can be considered as an increase of debt within the inhibition of the constitution. We are clearly of the opinion that it is not. Let us suppose a case as an illustration: Say that the Norristown School Board last year levied an eight-mill tax for school purposes and an eight-mill tax for building purposes, and that this year they resolved to increase the levy three mills in each case, or any number of mills below the maximum rate. The increase would undoubtedly impose an additional burden upon the taxpayers, but would it be for a moment contended that this would result in such an increase of debt as is claimed by the complainants? The question suggests its own answer. We can see no difference between this instance and the case at bar. The law authorizes a levy for library purposes not to exceed one mill. It provides the revenue and under no principle of interpretation can this agreement to levy an annual tax within the limit allowed by law be considered unauthorized, whatever the present debt of the school district may be.

III. THE POWER CONFERRED BY THE ACT OF 1895, P. L. 411, AND THE QUESTION OF THE CONSTITUTIONALITY OF THE ACT.

The act is entitled, "An act for the establishment of free public libraries in the several school districts of the Commonwealth, except in cities of the first and second class." It is comprehensive in its terms and provides a complete system for the establishment and maintenance of free public libraries under the control of school districts. It provides for the lawful acceptance by School Boards of gifts and grants of lands and money for library purposes and provides for a revenue and a system of man-

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agement. It is not necessary to quote the act, although it is important legislation. We have given the substance of it.

But, say the complainants, the act is unconstitutional because it violates the provision of the constitution prohibiting special or local legislation regulating the affairs of school districts. The act excepts from its operation cities of the first and second class. The cases cited by counsel in support of this proposition are Common Pleas decisions: Com. vs. Richard, 8 Pa., C. C. 563; Gaston vs. Graham, 18 Pa., C. C. 266; Baker vs. McGee, 6 Dist. Rep., 599; and Com. vs. Gilligan, 8 Kulp, 560. Counsel might also have cited a case in our own court (Lackawanna county) where we took the same view as the other Common Pleas Judges. But the question has been set at rest by the Supreme Court in the case of Com. vs. Gilligan, 195 Pa., 504, reversing one of the cases cited by counsel. It is now settled that there is no constitutional objection to the classification of school districts any more than of cities. Public bodies or communities which have a similarity of situation, circumstances and requirements, may be grouped together for the purpose of legislation. Although not pertinent now, we may say in passing, that there was a good reason for excepting cities of the first and second class from the operation of the act of 1895. Our large cities have public libraries munificently endowed by liberal grants and gifts. The legislature knew this and undoubtedly omitted such cities for this reason. At any rate, the case of Com. vs. Gilligan, *ut supra,* is decisive as to the constitutionality of the act of Assembly in question.

IV. IS THE ACT OF 1895 REPEALED, SO FAR AS IT RELATES TO BOROUGHS, BY THE ACT OF 1897, P. L. 84.

It appears that on May 25, 1897, the Legislature passed an act authorizing boroughs to make appropriations for the establishment and maintenance of free public libraries. This act of Assembly is a crude piece of legislation, incomplete as a system for the institution, regulation and maintenance of public libraries, and it was evidently passed without reference and probably without knowledge of the act of 1895. Nevertheless, it is claimed that this act of May 25, 1897, repeals the school district act of 1895. There are several reasons why this contention can not be maintained: (1) There is no reason why the two acts of Assem-

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bly can not stand together; (2) the act of 1895 is not inconsistent with the act of 1897, and it provides a much more comprehensive system than the later act in reference to public libraries; (3) the Legislature evidently considered that the act of 1895 was not repealed because it was amended once in 1897 and twice in 1891.

The Legislature that passed the so-called "Borough" act of May 25, 1897, less than two months before that time amended the "School act" of 1895 (P. L. 1897, p. 10), and the Legislature of 1901, on May 11, passed two amendments to the same act (P. L. 1901, pp. 179 and 180). Under these circumstances we do not think the act of 1895 is repealed.

Recapitulating our conclusions we say:

1. The complainants are proper parties and a court of equity has jurisdiction of the complaint.

2. The School Board acted within the limits of reasonable discretion and by authority of law.

3. The resolution of the School Board agreeing to appropriate $5,000 annually for the support of the library is not such an increase of indebtedness of the school district as comes within the prohibition of the constitution.

4. The school library act of 1895 is constitutional and is not repealed by the "borough" act of 1897.

Holding these views, we direct judgment to be entered upon the demurrer in favor of the defendants, and we direct that the bill of complainants be dismissed, at their costs.

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